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Dusting Off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities

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DUSTING OFF THE LAW BOOKS: RECOGNIZING GENDER PERSECUTION IN CONFLICTS AND ATROCITIES

Lisa Davis^{1*}

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INTRODUCTION: WHY GENDER PERSECUTION?

War-time abuses against women, girls, lesbian, gay, bisexual, transgender, intersex, queer (LGBTIQ), non-binary and gender non-conforming persons² are not new. They are as old as human history, appearing in modern international criminal law records as far back as World War II (WWII). In conflicts across the globe, from Iraq to Colombia, armed actors have perpetrated gender-based crimes amounting to persecution in an effort to reinforce oppressive, discriminatory gender narratives.³ Rarely documented when they happen, perpetrators are hardly ever held accountable for these crimes. As a result, their crimes are often excluded from consideration by international and domestic tribunals, and in effect, are left out of history. International criminal jurisprudence is silent on gender persecution, despite international law's decades-long recognition of it as a crime.⁴ This silence derives from a lack of recognition and understanding of the intent to discriminate against a group based on their gender.

The inclusion of gender persecution as a crime against humanity in the Rome Statute,⁵ which governs the International Criminal Court (ICC), provides a pathway forward for the international community to meaningfully

² While the acronym LGBTIQ is inclusive of a broad range of people, it is not exhaustive, nor is it the universally standard acronym.

³ This article follows the definition of "gender" set by the World Health Organization (WHO) and legal understanding provided by the International Criminal Court, Office of the Prosecutor (OTP). The WHO states:

Gender refers to the characteristics of women, men, girls and boys that are socially constructed. This includes norms, behaviours and roles associated with being a woman, man, girl or boy, as well as relationships with each other. As a social construct, gender varies from society to society and can change over time.

Gender and Health, WORLD HEALTH ORGANIZATION, https://www.who.int/health-topics/gender#tab=tab_1. The OTP recognizes "the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and [to] girls and boys." INT'L CRIM. CT., OFFICE OF THE PROSECUTOR, POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES 3 (2014), <https://www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> [hereinafter ICC OTP POLICY PAPER]. Author uses the working definition of the term gender narrative as a set of ideas that defines a social construction of an individual or group's identity based on their sex and/or gender, and gender prescription as a gender narrative enforced on a person or group often through the use of violence or other forms of fundamental rights deprivations.

⁴ Gender persecution is recognized under the Rome Statute of the International Criminal Court art. 7(1)(h), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. At the time of this writing, the only international tribunal known to have made a finding of gender persecution is The War Crimes Chamber of the State Court of Bosnia and Herzegovina in the *Samardžić*, *Kujundžić*, and *Perković* cases. ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE, COMBATING IMPUNITY FOR CONFLICT-RELATED SEXUAL VIOLENCE IN BOSNIA AND HERZEGOVINA: PROGRESS AND CHALLENGES, 60-62 (2014), <https://www.osce.org/files/f/documents/8/9/117051.pdf>.

⁵ *Id.*

challenge this type of harm.⁶ Regrettably, this critical progress on the definition of gender has never been fully realized under international criminal law, failing to move from paper to practice. There are myriad forms of accountability, ranging from restorative justice models to international tribunals to domestic court proceedings, but a first step to any justice process is agreement on what constitutes a crime or wrongdoing.⁷ Holistic redress for harms caused during atrocities not only calls for accountability, but also understanding *why* these crimes took place. As with all forms of persecution, accountability for gender persecution requires recognition of its underlying discrimination. Such recognition would demonstrate to the world that targeting women, girls, LGBTIQ, non-binary and gender non-conforming persons because of their gender is a crime against humanity. It would promote a survivor-centered⁸ approach (also known as a victim-centered approach)⁹—recognizing a broader range of survivors and their rights to participate in peace and transitional justice mechanisms. Finally, it would also help build sustainable peace, disrupting the normalization of gender discrimination and violence institutionalized in existing law and practice.

Whether in times of peace or conflict, recognition of the bias motivations which fuel egregious crimes provides a pathway to developing sustainable solutions that can address cyclical violence at its source. Take for example, the movement for racial justice in the United States. Without acknowledging racist motivations behind beatings or murders of Black people committed by authorities, police brutality cannot be holistically addressed.¹⁰ Similarly, the refusal to understand the discriminatory intentions

⁶ See ROSEMARY GREY, *PROSECUTING SEXUAL AND GENDER-BASED CRIMES AT THE INTERNATIONAL CRIMINAL COURT* 61-65 (Cambridge Univ. Press, 2019) (providing an in-depth analysis of gender-based crimes at the ICC through mid-2018).

⁷ This article discusses the need for the recognition of gender persecution as crime or harm and survivors' participation in accountability. How accountability for gender persecution should be addressed is outside the scope of this article.

⁸ This article uses both terms "victims" and "survivors", recognizing that some persons who have endured harms identify with the term "survivor" while others prefer the term "victim."

⁹ Scholars and instruments either use the term "victim-centered" or "survivor-centered" to refer to the same approach. This article uses the term survivor-centered approach.

¹⁰ See, e.g., Movement for Black Lives, *The Time Has Come to Defund the Police: Values & Vision*, <https://m4bl.org/defund-the-police> (last visited Aug. 1, 2020) (calling to defund the police in response to long-standing racist police violence). There are numerous examples throughout the United States and across countries of how discriminatory narratives influence laws and policies to deny citizens equal rights and justify violence committed against them. E.g., Nermeen Saba Arastu, *Aspiring Americans Thrown Out in the Cold: The Discriminatory Use of False Testimony Allegations to Deny Naturalization*, 66 UCLA L. REV. 1078 (2019) (discussing how bias plays a role in the discriminatory adjudication of an ostensibly neutral law and policy, and how the law creates a grey zone for the insertion of this discriminatory intent); Charisa Smith, *Unfit Through Unfairness: The Termination of Parental Rights Due to a Parent's Mental Challenges*, 5 CHARLOTTE L. REV. 377 (2014) (examining discrimination against parents with mental disabilities in the U.S. child welfare system).

that motivate perpetrators to rape, enslave, torture or execute civilians does little to guarantee its non-repetition. It is not enough to hold perpetrators accountable for crimes that take place during atrocities. Justice also requires an understanding of how perpetrators justify such acts—if justice is to root out discrimination and break cycles of violence. The recognition of racial bias as motivation for police violence also calls for the inclusion of Black people in devising the solutions to end it. Similarly, the recognition of gender discrimination as a driver for conflict-related crimes calls for the participation of those most impacted by discrimination in peace and transitional justice processes, which are designed to ensure atrocities do not repeat. Now is the time to dust off the law books on the crime of gender persecution and bring justice to a more inclusive group of survivors and victims who have never in history received full recognition.

This article contains three sections: (1) Understanding Gender Persecution; (2) Applying a Gender Persecution Lens, and (3) Recognizing Gender Persecution Survivors' Rights to Participation. Section I begins by examining how gender persecution is defined under international law. It examines precedence under international human rights and refugee law, and draws together the fragments of international criminal law that shed light on gender discrimination underlying crimes which may amount to gender persecution. It then unpacks the convergence of the terms “sex” and “gender” and the more complicated relationship between sexual violence and gender-based violence. Section II examines the discriminatory intent that drives perpetrators to commit gender-based crimes such as rape, enslavement, torture, and murder, and demonstrates how these crimes may meet the criteria for gender persecution. Looking to the past, this section examines the treatment of women and LGBTIQ persons by the Nazi Regime during WWII, and then shifts to present-day armed actors including the Islamic State of Iraq and Syria (ISIS) in Iraq, armed actors in Colombia's conflict, and Ansar al-Dine and al-Qaeda in the Islamic Maghreb (AQIM) in Mali. Section III argues how a survivor-centered approach offers a path to participation in peace and transitional justice processes—not only for women—but also for LGBTIQ, non-binary and gender non-conforming persons through the recognition of gender persecution. The section begins by reviewing the historical call for the inclusion of women civil society members in peace processes and the challenges that remain present today. It then examines United Nations (UN) Security Council Resolution 2467, which enshrines a survivor-centered approach.¹¹ This article concludes with practical recommendations for the international community and local

¹¹ S.C. Res. 2467 (Apr. 23, 2019).

communities to increase recognition, prevention and redress for gender persecution and to promote a survivor-centered approach for peace and transitional justice processes.

I. UNDERSTANDING GENDER PERSECUTION

Generally, a finding of persecution, *inter alia*, requires an underlying crime and a protected ground (akin to a protected class under human rights anti-discrimination law).¹² Specifically, it requires the deprivation of a fundamental right (*actus reus*) carried out with discriminatory intent (*mens rea*) against an identified group.¹³ The first element, requiring the prosecution to show that the persecutory act in question violated a fundamental right, is not without its challenges. While the range and focus of underlying acts varies by statute and practice, traditionally persecution has included the most egregious acts known to humankind, such as rape, enslavement, torture, and murder.

What constitutes an identified group has long been debated by experts, who have discussed a diverse range of categories including age, race, ethnicity or social origin, Indigenous status, language, religion or belief, political or other opinion, nationality, culture, wealth, birth, health or other status, sex, gender, sexual orientation, gender identity, sex characteristics, disability status, statelessness, status as a refugee or migrant, among other grounds.¹⁴ Perhaps William Schabas settled the scholarly debate best when reasoning that “grounds” for discrimination should include *any* category that is not treated as an *acceptable* form of discrimination under international law.¹⁵ While grounds for discrimination vary between experts and among

¹² Persecution, like with any provision of crimes, requires proof of jurisdictional or “chapeau” elements. *E.g.*, In the Rome Statute, persecution falls under crimes against humanity requiring these chapeau elements also be met. INT’L CRIM. CT., ELEMENTS OF THE CRIMES 5, 10 (2011). The requirement that persecution be committed in relation to another provision/listed crime is part of the Rome Statute, but not required under customary law. For historical discussion on the development of discriminatory intent and other underlying crimes, see Helen Brady & Ryan Liss, *The Evolution of Persecution as a Crime Against Humanity*, in HISTORICAL ORIGINS OF INT’L CRIM. LAW, VOL. 3, 447-49, 457-58 (Morten Bergsmo et al. eds., 2015).

¹³ *See e.g.*, Rome Statute, *supra* note 4, art. 7.2(g) (defining persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”).

¹⁴ *E.g.*, Letter dated Nov. 30, 2018 from the U.N. Special Rapporteur to the Int’l Law Comm’n, *Re: Comments Regarding the Persecutory Grounds in the Draft Crimes Against Humanity Convention* (Nov. 30, 2018) (available at <https://www.ohchr.org/Documents/Issues/Executions/LetterPersecution.pdf>).

¹⁵ WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE, 198-200 (Oxford Univ. Press, 2016). Schabas advises that, “This positive approach to interpreting ‘other grounds’ should direct the [International Criminal] Court to a range of authorities in international law where the inclusion of other categories, like age, disability, and sexual orientation, are considered.” *Id.* at 199.

statutes, gender as a basis for discrimination, or its better-known sister category of “sex,” has been named since the birth of modern international law.¹⁶

By definition, gender-based crimes target women, men, children, LGBTIQ, non-binary and gender non-conforming persons, on the premise of gender discrimination. At its core, gender-based crimes are used as punishments against those who are perceived to transgress assigned gender narratives that regulate “accepted” forms of gender expression manifest in, for example, roles, behaviors, activities, or attributes.¹⁷ These narratives often regulate every aspect of life, determining the extent of individuals’ freedom of movement, their reproductive options, whom they can marry, where they can work, how they can dress and whether they are simply allowed to exist.¹⁸ When harmful gender narratives intertwine with other discriminatory narratives used to reinforce systems of oppression, such as racism or xenophobia, they create new narratives that compound oppression for people who face multiple and intersecting forms of discrimination. Gender-based crimes may meet the threshold for persecution when, for example, underlying crimes such as rape, enslavement, torture, or murder are used as punishments for deviating from gender narratives, or when the crime itself is the narrative, as it often is in the case of enslavement¹⁹ and forced marriage.²⁰

¹⁶ E.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

¹⁷ See ICC OTP POLICY PAPER, *supra* note 3, at 3. For a discussion on the development of the Policy Paper, see Valerie Oosterveld, *The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law*, 24 WM. & MARY J. WOMEN & L. 443 (2018).

¹⁸ See generally Cynthia Soohoo & Farah Diaz-Tello, *Torture and Ill-Treatment: Forced Sterilization and Criminalization of Self-Induced Abortion*, in GENDER PERSPECTIVES ON TORTURE: LAW AND PRACTICE, AM. U. CTR. FOR HUM. RTS & HUMANITARIAN L. 280-81, 294 (2018) (discussing how stereotypes about women’s proper roles can lead to coercion, discrimination and ill-treatment in the context of reproductive decision making).

¹⁹ See generally Patricia Sellers, *Wartime Female Slavery: Enslavement?*, 44 CORNELL INT’L L.J. 115 (2011) [hereinafter Sellers, *Wartime Female Slavery*] (discussing wartime female slavery under a gender discrimination lens that examines oppressive gender roles).

²⁰ See, e.g., HRGJ CLINIC OF CUNY SCH. OF L. ET AL., COMMUNICATION TO THE ICC PROSECUTOR PURSUANT TO ARTICLE 15 OF THE ROME STATUTE REQUESTING A PRELIMINARY EXAMINATION INTO THE SITUATION OF GENDER-BASED PERSECUTION AND TORTURE AS CRIMES AGAINST HUMANITY AND WAR CRIMES COMMITTED BY THE ISLAMIC STATE OF IRAQ AND THE LEVANT (ISIL) IN IRAQ ¶ 42 (2017), <https://www.madre.org/sites/default/files/PDFs/CUNY%20MADRE%20OWFI%20Article%2015%20Communication%20Submission%20Gender%20Crimes%20in%20Iraq%20PDF.pdf> (discussing how women were forced into marriage as young as age nine and punished with stonings or death when they resisted); WOMEN OF THE ISLAMIC STATE: A MANIFESTO ON WOMEN BY THE AL-KHANSSAA BRIGADE 25 (Charlie Winter trans., 2015), <https://therinjfoundation.files.wordpress.com/2015/01/women-of-the-islamic-state3.pdf> [hereinafter WOMEN OF THE ISLAMIC STATE] (discussing the role of women in the *Women in the Islamic State: Manifesto and Case Study* published by ISIS). “The role of women [prescribed by ISIS] is inherently “sedentary”, and that her responsibilities lie first and foremost in the

It is important to understand the root causes of gender-based crimes, not only to ensure adequate justice, but also to build sustainable and inclusive peace. While community members who face longstanding discrimination often experience the brunt of conflict, they are routinely absent from peace and transitional justice processes to end it. Part of their exclusion comes from their denial as rights-holders in such mechanisms. In order to have survivors at the table there must first be a shared recognition of survivors as rights-holders as well as *who* survivors are. Much like the mandate for women's participation, survivors' participation increases societies' acceptance of transitional processes, thus furthering their impact and sustainability. This is why the recognition of all forms of persecution, including on the basis of gender, is not only critical to accountability, but also to sustainable peace.

Under modern international criminal law, persecution has been recognized as an official crime against humanity since the Nuremberg trials. The Charter of the International Military Tribunal established persecution on political, racial, and religious grounds.²¹ In the 1990s, while the International Criminal Tribunal for the former Yugoslavia (ICTY) Statute maintained these same persecutory categories,²² the International Criminal Tribunal for Rwanda (ICTR) Statute expanded the categories to include ethnic and national grounds.²³ By the late 1990s, drafters of the Rome Statute expanded the categories again to include another two categories, making it the first treaty to explicitly reference gender as a ground for persecution.²⁴ Under the Rome Statute, persecution is defined as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."²⁵ The Statute names grounds for

house, except in a handful of narrowly defined circumstances. This role begins at the point of marriage which, it is declared, can be as young as nine years old." *Id.* at 8.

²¹ Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 82 U.N.T.S. 279. The Charter of the International Military Tribunal for the Far East also named persecution as a crime against humanity, but only included political or racial grounds. Charter of the International Military Tribunal for the Far East art. 5, Apr. 26, 1946, 4 Bevans 28 (replacing the original Charter, Jan. 19, 1946, 4 Bevans 20).

²² Statute of the International Crim. Tribunal for the Former Yugoslavia art. 5, May 25, 1993, 32 I.L.M. 1192 (1993).

²³ Statute of the International Crim. Tribunal for Rwanda art. 3, Nov. 8, 1994, 33 I.L.M. 1602 (1994).

²⁴ E.g., Valerie Oosterveld, *Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance to the Crimes Against Humanity of Gender-Based Persecution*, 17 DUKE J. COMP. & INT'L L. 49, 58 (2006) [hereinafter Oosterveld, *Gender, Persecution, and the International Criminal Court*]. See also Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217 (2006) (discussing how advocates were able to secure "gender" as a recognized ground in the Rome Statute). Professor Copelon was the founder of the HRGJ Clinic, formerly known as the International Women's Human Rights Clinic, at CUNY Law School.

²⁵ Rome Statute, *supra* note 4, at art. 7(2)(g).

protection from persecution: political, racial, national, ethnic, cultural, religious, and gender, but the list is not exhaustive.²⁶

The only persecution category that contains a definition under the Rome Statute—gender—is defined as, “the two sexes, male and female, within the context of society.”²⁷ At the time of its formation, the definition satisfied advocates and opponents of the term “gender,” with both parties recognizing the inextricable link between “sex” and “gender,” albeit from different perspectives.

Initially, a small coalition, comprised of the Vatican and conservative countries, opposed the use of the term “gender” to define a protected class of victims under the crime of persecution.²⁸ Opponents argued that “gender” has no clear meaning whereas “sex” defines differences along a biological/binary understanding.²⁹ Moreover, they feared the recognition of the social construction of gender roles would negate the patriarchal structure that justifies gender-based discrimination and the violence used to reinforce it. At stake in replacing “gender” with “sex” was not only the risk of further concretizing women’s rights as secondary rights, but also the exclusion of rights for LGBTIQ persons altogether.³⁰ While these bigoted views wielded a heavy hand in the negotiations, they were not representative of the overwhelming majority of delegates who favored the more inclusive term of gender and embraced its definition as a social construction.³¹

Opponents of including the term “gender” felt the definition in the Rome Statute succeeded in limiting the scope of “sex” to a male-female binary.³² Advocates believed they succeeded in codifying the socially constructed understanding of what it means to be “male and female” through the phrase “within the context of society.”³³ Today, the ICC’s Office of the

²⁶ Persecution may also be committed on “other grounds that are universally recognized as impermissible under international law.” *Id.*, art. 7(1)(h).

²⁷ *Id.*, art. 7(3).

²⁸ Lisa Davis, *Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGBTI Persons*, 24 WM. & MARY J. WOMEN & L. 513, 537-40 (2018) [hereinafter Davis, *Reimagining Justice*].

²⁹ E.g., Cate Steains, *Gender Issues*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS 373 (Roy S. Lee, ed., 1999).

³⁰ Davis, *Reimagining Justice*, *supra* note 28, at 537-40.

³¹ Copelon, *supra* note 24, at 236.

³² Copelon, *supra* note 24, at 237; See also Davis, *Reimagining Justice*, *supra* note 28, at 537-38.

³³ Valerie Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 64 HARV. HUM. RTS. J. 55, 82 (2005) [hereinafter Oosterveld, *The Definition of “Gender”*]. For a discussion on the conflation of the terms “sex” and “gender” and the terms “gender” and “woman,” see *id.* pp. 71, 77-79.

Prosecutor (OTP) understands the term “gender” as a social construct³⁴ and the limitation of a “binary” as one that perpetrators may enforce.³⁵

The OTP’s understanding is just one piece of evidence that women’s rights advocates won rhetorical acceptance of a broader condemnation of gender-based violence outside of sexual violence when they shifted legal language from “sex” to “gender” persecution in the draft Rome Statute.³⁶ From the time of the formation of the Rome Statute to today, this definition has been understood in international law to embrace the social construction of gender.³⁷

Over twenty-five years of international human rights jurisprudence, U.N. resolutions, and regional treaty bodies have borne this out.³⁸ As far back as 1995, the United Nations defined gender as “the ways in which roles, attitudes, values and relationships regarding women and men are constructed by all societies all over the world. Therefore, while the sex of a person is determined by nature, the gender of that person is socially constructed.”³⁹ In 2005, Valerie Oosterveld surveyed the definitions of “gender” under international human rights and refugee law and found that all UN definitions continued to identify gender as a social construct.⁴⁰ Since Oosterveld’s analysis, human rights and refugee law still uphold this affirmation.⁴¹

The International Law Commission (“the Commission”), which clarifies the evolution of international law, has also affirmed this definition of gender under international criminal law.⁴² When discussing grounds for persecution, the Commission reiterated that gender is understood as a social construct and encouraged states to follow international law precedents

³⁴ ICC OTP POLICY PAPER, *supra* note 3, at 3.

³⁵ *See infra* note 83.

³⁶ *See* Copelon, *supra* note 24, at 236-37.

³⁷ *E.g.*, Davis, *Reimagining Justice*, *supra* note 28, at 536-44; Oosterveld, *The Definition of “Gender”* *supra* note 33, at 58; Copelon, *supra* note 24, at 237.

³⁸ *E.g.*, Davis, *Reimagining Justice*, *supra* note 28, at 547-53.

³⁹ Oosterveld, *Definition of “Gender”*, *supra* note 33, at 67 (citing Comm’n on Hum. Rts. Report of the Expert Group Meeting on the Development of Guidelines for the Integration of Gender Perspectives into U.N. Human Rights Activities and Programmes ¶ 13, U.N. Doc. E/CN.4/1996/105 (Nov. 20, 1995)). During the drafting of the Rome Statute, such documents reflecting the United Nations’ definition of gender as a social construct were circulated among delegates. Steains, *supra* note 29, at 358.

⁴⁰ Oosterveld, *Definition of “Gender”*, *supra* note 33, at 67.

⁴¹ *E.g.*, Davis, *Reimagining Justice*, *supra* note 28, at 542. Human rights law has for decades, however, recognized discrimination based on sexual orientation and gender identity in accordance with the understanding of gender as a social construct. *Id.* at 547-53.

⁴² Sean D. Murphy, *Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the ILC’s Work Product*, in *THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS: ESSAYS IN MEMORY OF SIR IAN BROWNLIE* 2, 1-11, Maurizio Ragazzi, ed., (Brill & Nijhoff, Leiden 2013).

confirming this.⁴³ The Commission's determination means that the ICC must also adopt this understanding, since it is obligated by the Rome Statute to interpret legal terms in light of evolving international law.⁴⁴ However, this critical progress on the definition of gender has not been fully realized. While the Court has prosecuted a range of sexual violence crimes, and for the first time in its history has pending charges on gender persecution,⁴⁵ it has yet to prosecute a single case of gender persecution at the time of this writing.

Part of the problem lies with the relative lack of conceptualization of the term "gender" under international criminal law. The failure to recognize a broad swath of gender-based crimes derives in part from the lack of understanding of what gender-based persecutory acts look like during atrocities, apart from sexual violence. Most of the gender-related case law from international criminal tribunals since 1993 has focused on sexual violence, which offers some clarity as to how these acts may fall within the crime of gender persecution.⁴⁶ The Rome Statute also gives some clues in the enumerated forms of sexual crimes.⁴⁷ Activists in the 1990s were formidable in their work to deepen the understanding of what might constitute a sexual violence crime,⁴⁸ making the Rome Statute pioneering for its time. It was the first treaty to explicitly proscribe the crimes of rape, forced pregnancy, enforced prostitution, and enforced sterilization, as both war crimes and crimes against humanity under the same instrument.⁴⁹ However, the case law is still quite underdeveloped regarding other gender-based crimes that may amount to gender persecution and lay beyond the scope of sexual violence.

As the discourse on gender-based crimes continues to evolve, scholars and legal experts have begun to shift the discussion from exploring gender

⁴³ Lisa Davis & Daniel Bradley, *Gendered Dimensions of Persecution*, in GENDER AND INTERNATIONAL CRIMINAL LAW, (Valerie Oosterveld, et al. eds., forthcoming Oxford Univ. Press, 2021) (citing the Int'l Law Comm., Report on the Work of Its Seventy-First Session, ¶¶ 41-42, U.N. Doc. A/74/10 (Apr. 29–June 7 and July 8–Aug. 9, 2019)).

⁴⁴ Rome Statute, *supra* note 4, at art. 21(3).

⁴⁵ See *infra* pp. 35-38 (discussing the ICC *Al Hassan* case where gender persecution charges have been issued).

⁴⁶ Laurel Baig et al., *Contextualizing Sexual Violence: Selection of Crimes* in, PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY 188 (Oxford Univ. Press, 2016).

⁴⁷ Rome Statute, *supra* note 4, art. 7(1)(g) & 8(b)(xxii).

⁴⁸ See Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486 (1990).

⁴⁹ Diane Lupig, *Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court*, 17 AM. U. J. GENDER SOC. POL'Y & L. 431, 431, 452, 457-65 (2009). For a discussion on how feminist advocates were able to win this accomplishment at Rome, see Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L L. 1 (2008); Steains, *supra* note 29, at 358.

persecution in theory to imagining its application in practice.⁵⁰ Valerie Oosterveld, A. Widney Brown, and Laura Grenfeld, among others, have noted how refugee and human rights law are important tools aiding in the application of persecution charges under international criminal law.⁵¹ Like international human rights law, refugee law has recognized gender-related persecution over the last thirty-five years.⁵² While the two bodies of law have evolved from different jurisprudence,⁵³ the recognition of gender-related persecution within the context of refugee law has helped persuade drafters of the Rome Statute to include gender as a persecutory category under the chapeau of crimes against humanity.⁵⁴ Today, refugee law understands a broad range of gender persecution acts including sexual violence, domestic violence, reproductive violence including female genital mutilation, violence against homosexuals, and transgender persons, and more broadly punishment for transgression of social mores.⁵⁵

The ICTY and ICTR discussions on how transgressing gender prescriptions imposed by perpetrators may serve as the underlying basis for crimes, provide additional building blocks for understanding gender persecution under international criminal law. In the ICTR's *Nahimana* case, the Court addresses how Tutsi women were branded as "femmes fatales" and "seductive agents of the enemy,"⁵⁶ noting this as a motivational factor behind the sexual violence and killings committed against them.⁵⁷ The ICTY's

⁵⁰ E.g., CUNY Sch. of L., *Prosecuting ISIS Crimes against Women and LGBTI Persons*, YOUTUBE (Nov. 13, 2017), <https://www.youtube.com/watch?v=-u5G2haD3vo>; CUNY Sch. of L. & MADRE, *Reimagining Justice: Ending Impunity for Gender-Based Crimes at the Margins: Experts Convening on the Draft Crimes Against Humanity Treaty Outcomes and Observations* (Mar. 12, 2018), <https://www.madre.org/sites/default/files/PDFs/CAH%20Experts%20Meeting%20Outcomes%20Report.pdf>; CUNY Sch. of L. & MADRE, *LGBTIQ Civil Society Convening: Strengthening the Protection of LGBTIQ Persons in the Draft Crimes Against Humanity Treaty* (Oct. 26, 2018), https://www.madre.org/sites/default/files/PDFs/CAH%20LGBTI%20Convening_Outcome%20Report.pdf.

⁵¹ Oosterveld, *Gender, Persecution, and the International Criminal Court*, *supra* note 24, at 52; A. Widney Brown & Laura Grenfeld, *The International Crime of Gender-Based Persecution and the Taliban*, 4 MELB. J. INT'L L. 347, 360-61 (2003).

⁵² Oosterveld, *Gender, Persecution, and the International Criminal Court*, *supra* note 24, at 50-51.

⁵³ Note that asylum claims are often based on national interpretation of the Refugee convention as incorporated under national law.

⁵⁴ Oosterveld, *Gender, Persecution, and the International Criminal Court*, *supra* note 24, at 50-51.

⁵⁵ U.N. High Comm'r for Refugees (UNHCR), *Guidelines on International Protection*, ¶ 3, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) [hereinafter UNHCR, *Guidelines*].

⁵⁶ *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment, ¶ 1079 (Dec. 3, 2003).

⁵⁷ *Id.* at n.75.

Čelebići,⁵⁸ *Kvočka*,⁵⁹ and *Kunarac*⁶⁰ judgments all found rape as a form of torture, and point to gender and ethnicity as discriminatory grounds.⁶¹

Baig, Jarvis, Martin Salgado, & Pinzauti note three significant developments from prosecutions of sexual violence as torture under the ICTY statute that are helpful for understanding the framework of persecution. First, conflict-related sexual violence is often motivated by gender discrimination. Several cases reflect this development. The *Čelebići* Court concluded that the rape of two women detainees was committed because the victims were women.⁶² The *Kvočka* Court found that sexual violence committed against women in detention was a “natural or foreseeable consequence” of their incarceration, since rape and humiliation were accepted forms of violence committed against women targeted as an ethnic enemy.⁶³ The *Kvočka* judgment notes how the sexual violence was only committed against non-Serb detainees and only against women, making the crimes discriminatory on both ethnic and gender grounds.⁶⁴ Second, a perpetrator may hold multiple motives for committing sexual violence; one motive does not negate or trump another motive. For example, sexual motives, or what is sometimes referred to as “opportunistic rape,” does not negate discriminatory motives. The element of “prohibited purposes” necessary for a finding of torture (and includes discrimination) may still be met. In *Kvočka*, detention guards who committed these egregious acts were depicted as “men with weapons who were often drunk, violent, and physically and mentally abusive and who were allowed to act with virtual impunity.”⁶⁵ While such acts historically have often been thought of as an “inevitability” of war,⁶⁶ the Court concluded they were committed with the “intent of [a joint] criminal enterprise to subject the targeted group to

⁵⁸ Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

⁵⁹ Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 1998).

⁶⁰ Prosecutor v. Kunera, Case No. IT-96-23/1-T, Judgment, ¶ 491 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

⁶¹ Baig et al., *supra* note 46, at 188.

⁶² *Id.* (citing Prosecutor v. Delalic, Case No. IT-96-21-T, ¶¶ 941, 963). “In addition, the violence suffered by [the victim] in the form of rape, was inflicted upon her by Delalic because she is a woman . . . [T]his represents a form of discrimination which constitutes a prohibited purpose for the offence of torture.” Prosecutor v. Delalic, Case No. IT-96-21-T, ¶ 941.

⁶³ Prosecutor v. Kvočka, Case No. IT-98-30/1-T, ¶ 327.

⁶⁴ Baig et al., *supra* note 46, at 188 (citing Prosecutor v. Kvočka, Case No. IT-96-23/1-T, ¶ 560).

⁶⁵ Prosecutor v. Kvočka, Case No. IT-98-30/1-T, ¶ 327.

⁶⁶ See *infra* Section I.b. (discussing the historical treatment of sexual violence as a consequence of conflict, invisibilizing its egregiousness).

persecution through such means as violence and humiliation.”⁶⁷ The Court expounded, “Indeed, it would be unrealistic and contrary to all rational logic to expect that none of the women held in Omarska, placed in circumstances rendering them especially vulnerable, would be subjected to rape or other forms of sexual violence.”⁶⁸ On appeal, the ICTY affirmed that personal motivations to commit sexual violence as torture do not void the intent to discriminate.⁶⁹ Third, a single act of rape may represent a strategic use of sexual violence and meet the requirement for the prohibited purposes element of torture.

The ICTY has also reflected on persecution committed on the basis of sexual orientation, noting in the *Tadic* case that “[t]he experience of Nazi Germany demonstrated that crimes against humanity may be committed on discriminatory grounds . . . such as physical or mental disability, age or infirmity, or sexual preference.”⁷⁰ As for the ICC, in its discussion on reparations in the *Lubanga* case, the Court identified “sexual orientation” as a protected class under article 21(3)⁷¹ of the Rome Statute.⁷² More recently in the ICC, gender persecution charges have been issued in the ongoing *Al Hassan* case,⁷³ which, as of this writing, may serve as the first successful ICC trial on gender persecution, offering a potentially groundbreaking judgment.⁷⁴ The Pre-Trial Chamber provided some clues as to what gender-

⁶⁷ Prosecutor v. Kvočka, Case No. IT-98-30/1-T, ¶ 327.

⁶⁸ *Id.*

⁶⁹ Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Judgment on Appeal, ¶ 370 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005); Prosecutor v. Kunarac, IT-96-23 & 23/1-A, Judgment on Appeal, ¶ 153 (Int’l Crim. Trib. for the Former Yugoslavia Jun. 12, 2002).

⁷⁰ Prosecutor v. Tadic, Case No. IT-94-I-A, Appeals Chamber Judgment, ¶ 285 (July 15, 1999). See *infra* Section II.a (examining gender-based harms committed by the Nazi regime that may have risen to the level of persecution).

⁷¹ Article 21(3) of the Rome Statute requires the Court’s application and interpretation of its legal instruments to be “consistent with internationally recognized human rights.” Rome Statute, *supra* note 4.

⁷² Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, ¶ 191 (establishing the principles and procedures to be applied to reparations). “Reparations shall be granted to victims without adverse distinction on the grounds of gender, age, race, colour, language, religion or belief, political or other opinion, sexual orientation, national, ethnic or social origin, wealth, birth or other status, as set forth by article 21 (3) of the Statute.” *Id.* (citing U.N. Basic Principles on Reparations, principle 25). On appeal, the Court rejected the inclusion of sexual and gender-based violence victims in reparations plans, citing the lack of a guilty conviction for any sexual and gender-based violence crimes. LOUISE CHAPPELL, THE POLITICS OF GENDER JUSTICE AT THE INTERNATIONAL CRIMINAL COURT: LEGACIES AND LEGITIMACY 148 (2016). However, the Appeals Court did note there should be a gender-sensitive approach to reparations. *Id.*

⁷³ The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No. ICC-01/12-01/18, Decision on Confirmation of Charges (Nov. 13 2019).

⁷⁴ Note that the OTP has also commenced two preliminary examinations to determine whether there is reasonable basis to open an investigation into crimes against humanity including persecution on political and gender grounds in Afghanistan and gender and religious grounds in Nigeria. Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17-7-Conf-Exp, Request for authorisation of an

based crimes entail, noting that persecution may cover a diverse range of acts “constituting a serious violation of fundamental rights enjoyed by every human being, committed with the aim of excluding a person from society on discriminatory grounds.”⁷⁵ The Court elaborated that gender persecution may manifest “when a man and a woman, members of the same group, are targeted in different ways or by different forms of violence depending on their gender”⁷⁶ Prior to the *Al Hassan* case, it was only in the *Mbarushimana* case at the ICC that the prosecutor attempted to bring charges of gender persecution.⁷⁷ The *Al Hassan* case is the first where gender persecution charges have been issued.

When it comes to proving the *actus reus* of persecution, ICTY prosecutors have exhibited a tendency to focus on proving elements of specific crimes instead of the broader requirement of a fundamental rights violation.⁷⁸ For example, in the *Krnjelac* case,⁷⁹ when analyzing deportation acts as a form of persecution, the Court applied the elements of the crime of deportation, rather than “conceptualizing them as violations of the victim’s right to live in their homes and communities without interference.”⁸⁰ This tendency could prove to be another obstacle to charging gender-based crimes as persecution in future proceedings, depending on the language of the governing statute.⁸¹

A. Discrimination at the nexus of “sex” and “gender”

To understand the nature of gender persecution, it is essential to examine the relationship between the terms “sex” and “gender.” The 2014 Policy Paper on Sexual and Gender-Based Crimes (“Policy Paper”) of the OTP clearly recognizes “the social construction of gender, and the

investigation pursuant to article 15, ¶ 42 (Nov. 20, 2017); ICC, *Statement of the Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Nigeria*, (Dec. 11, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=201211-prosecutor-statement>.

⁷⁵ Prosecutor v. Al Hassan, Case No. ICC-01/12-01/18, Pre-Trial Chamber Decision, ¶ 663 (Nov. 13, 2019).

⁷⁶ *Id.* ¶ 667.

⁷⁷ Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges (Dec. 16, 2011). See Leila N. Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. J. OF INT’L L. 334 (2013) (discussing the Court’s decision to decline all war crimes and crimes against humanity charges based on a lack of evidence).

⁷⁸ Baig et al., *supra* note 46, at 199-200.

⁷⁹ Prosecutor v. Krnjelac, Case No. IT-97-25-T, Judgment, ¶ 229 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002).

⁸⁰ Baig et al., *supra* note 46, at 199 (citing Prosecutor v. Krnjelac, Case No. IT-97-25-T, ¶¶ 474, 476, 478, 480, 484-85).

⁸¹ *Id.* at 199 (noting how accountability for gender persecution may depend on “overcoming a key conceptual challenge—the tendency to approach underlying acts of persecution as sub-crimes instead of analysing them through a ‘fundamental rights’ framework”).

accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys,”⁸² reflecting the last two decades of international law. This understanding of gender narratives assigned “men” and “women” should be viewed from the perpetrator’s intent to enforce prescribed narratives. However, it should not be taken as a presumption that the OTP views the construct of gender as limited to a binary.⁸³

While the Policy Paper refers to “gender” as a social construct and “sex” as a biological determination, it makes clear that the two are inextricably linked.⁸⁴ For example, the Policy Paper explains that “sex” is “the biological and physiological characteristics that define men and women.”⁸⁵ It then goes on to describe “gender-based crimes as those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles.”⁸⁶ This description reflects the understanding that was shared among the majority of Rome Statute drafting delegates.⁸⁷

The Policy Paper builds on a long understanding of the inextricable link between “sex” and “gender.” In 2009, when discussing gender-based crimes, former ICC Prosecutor Louis Moreno-Ocampo pointed to the Committee on the Elimination of Discrimination Against Women’s (CEDAW) naming of gender-based violence as a form of discrimination against women, noting how “the definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately.”⁸⁸ Ocampo stated unequivocally, “The Rome Statute is built on these understandings and we received a clear mandate to apply this new concept of ‘gender crimes’ or ‘gender violence,’ which requires first an understanding of sexual crimes as social and cultural events rather than in any sense natural or biological events.”⁸⁹

The U.S. Supreme Court echoed this inextricable link between “sex” and “gender” in the recent case *Bostock*, which addresses the issue of sex

⁸² ICC OTP POLICY PAPER, *supra* note 3, at 3.

⁸³ Conversation with Patricia Viseur-Sellers, Special Advisor for Gender for the Office of the Prosecutor of the International Criminal Court, Mar. 12, 2018 (on file with Author).

⁸⁴ ICC OTP POLICY PAPER, *supra* note 3, at 3.

⁸⁵ *Id.*

⁸⁶ *Id.* ¶ 16.

⁸⁷ See discussion *infra* Section II.a. (Gender-based persecution during World War II in Germany).

⁸⁸ Louis Ocampo-Moreno, *Keynote Address: Interdisciplinary Colloquium on Sexual Violence as International Crime: Interdisciplinary Approaches to Evidence*, 35 L. & SOC. INQUIRY 839, 842 (2010) (citing U.N. Comm. on the Elimination of Discrimination Against Women Gen. Rec. No. 19: Violence Against Women, ¶ 6 (1992)).

⁸⁹ *Id.*

discrimination in the workplace.⁹⁰ The *Bostock* Court determined that employment discrimination based on sexual orientation or gender identity is “inescapably” tethered to “sex” in the decision to discriminate.⁹¹ The Court stated, “An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. ‘Sex’ plays a necessary and undisguisable role in the decision.”⁹² In other words, “actions,” or “sex based rules,” apply in the determination of how one should act in their gender performance based on what the discriminator perceives to be the victim’s sex.⁹³ By using these terms, the Court demonstrates that gender narratives derive not only from a biological understanding of the concept of “sex,” but also from its social construction.⁹⁴ Without “sex” there would be no regulation of “gender” including sexual orientation and gender identity.⁹⁵

A key aspect of gender discrimination is the critical role that violence plays in maintaining subordination narratives. This mutually reinforcing relationship has been noted in nearly all major international and regional instruments governing human rights.⁹⁶ The classification of discrimination against women, girls, LGBTIQ, non-binary and gender non-conforming persons as “gender-based” demonstrates the international community’s broader understanding that such discrimination is not exclusively based upon biological determination. It recognizes the social construction of these biological differences and how they manifest in the prescription of roles, behaviors, activities, or attributes that ensconce the hierarchical position of cisgender, hetero-normative men and the subordination of women and those who fall outside the hetero-normative binary.⁹⁷ Still, much work needs to be done to build the mechanical application for this understanding of gender-based crimes that take place during atrocities, so they may be fully recognized and addressed.

⁹⁰ *Bostock v. Clayton County*, 150 S. Ct. 1731 (2020).

⁹¹ *Id.* at 1742.

⁹² *Id.* at 1737.

⁹³ *Id.* at 1745.

⁹⁴ *Id.*

⁹⁵ Note that discrimination based on sex characteristics may also be premised on a socially constructed understanding of “sex.”

⁹⁶ *E.g.*, Oosterveld, *The Definition of “Gender”* *supra* note 33, at 59.

⁹⁷ See ICC OTP POLICY PAPER, *supra* note 3, ¶ 16.

B. Discrimination at the nexus of sexual violence and gender-based violence

1. The treatment of sexual violence and underlying, gendered motivations in conflict

The recognition of sexual violence as a systematic tool and policy enacted by armed actors caused a significant shift in the discourse on gender-based crimes. Historically, gender narratives such as, “boys will be boys” or “rape is a collateral damage,” downplayed the gravity of sexual violence by portraying rape as a byproduct of war instead of as a tool to facilitate oppression.⁹⁸ Some narratives explain rape as a means to “energize” troops, providing a rationalization for sexual slavery⁹⁹ and enforced prostitution as part of the “war machinery.”¹⁰⁰ Sexual violence narratives encompass more than their rationalization as a “consequence of war” or their justification as a way to entertain or reward soldiers.¹⁰¹ Perpetrators also use rape as a strategy to demoralize and terrorize their opposition.¹⁰² Yet, historically when sexual violence was redressed, it was often portrayed as a violation of the “honor” or “dignity” of victims’ families, which misrepresents and shrouds its egregious impacts.¹⁰³

Discriminatory gender narratives embedded in sexual violence not only manifest in individual acts of violence, but are also reinforced and reflected by the justice mechanisms that adjudicate these crimes. Unsurprisingly, sexual violence crimes were not taken as seriously as other crimes during the early years of international criminal tribunals. Despite overwhelming cases of the widespread use of rape in the Rwanda genocide, it received very little mainstream media coverage and there was little willingness by the United Nations in the beginning to address it.¹⁰⁴ The first investigations teams lacked a gender framework, which contributed to a lack of capacity and competence necessary to collect evidence of rape crimes, reinforcing a cycle of

⁹⁸ See Doris E. Buss, *Rethinking ‘Rape as a Weapon of War’*, 17 FEMINIST LEGAL STUD. 145 (2009).

⁹⁹ See Sellers, *Wartime Female Slavery*, *supra* note 19.

¹⁰⁰ Kelly D. Askin, *The Quest for Post-Conflict Gender Justice*, 41 COLUM. J. TRANSNAT’L L. 509, 511-12 (2003).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Lisa Davis, *The Gendered Dimensions of Torture: Rape and Other Forms of Gender-Based Violence as Torture Under International Law*, TORTURE AND ITS DEFINITION IN INTERNATIONAL LAW: AN INTERDISCIPLINARY APPROACH 323 (Metin Basoglu ed., 2017) [hereinafter Davis, *Gendered Dimensions of Torture*] (citing Rhonda Copelon, *International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking*, 11 AM. U. J. GENDER SOC. POL’Y & L. 865, 866 (2003)).

¹⁰⁴ BINAIFER NOWROJEE, YOUR JUSTICE IS TOO SLOW: WILL THE ICTR FAIL RWANDA’S RAPE VICTIMS? 2 (U.N. Research Institute for Social Development, 2005).

impunity.¹⁰⁵ Institutionalized gender discrimination not only contributed to the invisibilization of sexual violence, it sometimes led to the harassment of female team members charged with investigating it. One investigator at the ICTY described it as working in a “locker room atmosphere.”¹⁰⁶ Even as women’s rights activists were starting to win recognition of rape in conflict, dismissal of the gravity of sexual violence as a crime persisted. Rhonda Copelon reflects that “it was not until the use of rape as a tool of ethnic cleansing in the former Yugoslavia did media and policy-makers begin to speak of rape as a ‘weapon of war’ and not as exclusively a crime of ‘honor’ or ‘dignity.’”¹⁰⁷

Rooted in a long history of vigorous advocacy, the feminist movement successfully shifted the discourse on sexual violence, flipping the narrative of its treatment as a consequence of war to its recognition as a tool of oppression. Feminist advocacy propelled sexual violence issues into the public discourse, winning policy reforms in national and international arenas, including the criminalization of rape and domestic violence under law.¹⁰⁸ Today, international criminal law recognizes rape and other forms of sexual violence as crimes and they are less often treated as “spoil[s] of war” or as “inevitable” everyday occurrences.¹⁰⁹ While there is still need to shift the discourse away from the view of sexual violence as a “women’s issue,” the international community has made strides towards recognizing a broader range of sexual violence acts as crimes.

With increasing awareness of sexual violence in its various forms comes the next step in the discourse: understanding gender-based crimes outside the scope of sexual violence, including acts that may rise to persecution. As reflected in the OTP Policy Paper, sexual violence crimes are not solely about sex nor do all gender-based crimes involve sexual violence.¹¹⁰ This begs the question: where do sexual violence and gender-based violence acts converge and when do they differ?

The former ICC Prosecutor helps to clarify the convergence between sexual violence crimes and gender-based crimes: “Sexual crimes are crimes of violence or coercion. The concept of gender-based crimes add[s] a

¹⁰⁵ See Patricia Viseur-Sellers, *Gender Strategy is Not Luxury for International Courts Symposium: Prosecuting Sexual and Gender-Based Crimes Before Internationalized Criminal Courts*, 17 AM. U. J. GENDER SOC. POL’Y & L. 301, 323 (2009).

¹⁰⁶ *Id.* at 311.

¹⁰⁷ Copelon, *supra* note 24, at 223.

¹⁰⁸ See Davis, *Gendered Dimensions of Torture*, *supra* note 103, at 322-25 (providing a detailed historical account of the global women’s movement’s struggle to achieve legal recognition of rape as a form of torture under international human rights and criminal law).

¹⁰⁹ *Id.* at 372.

¹¹⁰ ICC OTP POLICY PAPER, *supra* note 3, ¶ 16.

different dimension to the analysis. The new concept emphasizes that sexual crimes such as rape are crimes of gender inequality, enacted violently.”¹¹¹ Gender-based crimes encompass sexual violence crimes when committed on the basis of gender discrimination. They may also manifest as forms of violence or other harms that may or may not be sexual in nature. By definition, this also means gender-based crimes encompass a broader set of victims that may not only include women and girls, but also LGBTIQ, non-binary and gender non-conforming persons.¹¹² The challenge is in spotting these crimes. “[First] you have to get people to understand that of course there’s a gender component to sexual violence Then you have to get them to understand there are gender-based crimes with no sexual component.”¹¹³

There can of course also be instances where sexual violence is not based on gender discrimination. For example, a perpetrator intending to torture victims may target their sex organs to achieve a higher degree of pain, regardless of gender status.¹¹⁴

2. *Sexual violence against men and boys*

From a legal perspective, sexual violence differs from gender-based violence when a critical legal element is missing: gender discrimination. Human rights law has enshrined the right for protected classes to be free from discrimination, recognizing the marginalization of individuals or groups. Gender-based violence is analogous to other forms of discriminatory violence, such as violence based on a victim’s race, ethnicity, nationality, religion, Indigenous status, immigration status, or disability status, to name a few.¹¹⁵ Similar to other forms of discrimination, gender-based violence works as a tool to enforce systems of oppression. Thus, in order to end the cycle of gender-based violence, its relationship to discrimination must be understood and addressed.

Gender-based violence is also used to manipulate oppressive gender narratives and break down victims who may believe in them, but are not subordinated by them in their everyday lives. In this way, hetero-normative men may experience sexual violence as gendered crimes, but the nuance is

¹¹¹ Ocampo-Moreno, *supra* note 88, at 841.

¹¹² E.g., Valerie Oosterveld, *Gender-Based Crimes Against Humanity*, in *FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY* 78, 94 (Layla Sadat ed., Cambridge Univ. Press, 2011).

¹¹³ See GREY, *supra* note 6, at 259 (citing an interview with Niamh Hayes in July 2017).

¹¹⁴ See, e.g., INDEP’T INT’L COMM’N OF INQUIRY ON THE SYRIAN ARAB REPUBLIC, *DETENTION IN THE SYRIAN ARAB REPUBLIC: A WAY FORWARD* (Mar. 8, 2018) (discussing rape and other forms of sexual violence committed against detainees in Syria).

¹¹⁵ See U.N. Spec. Rap. Open Letter to the Int’l Law Comm, *supra* note 14 for a non-exhaustive list of discriminatory grounds discussed by U.N. experts.

critical. Eve Ayiera explains the gendered motivations often behind sexual violence committed against men and boys: “Sexual violence is an assertion of male dominance and a tool of domination, humiliation and of feminisation, where femininity is interpreted as an insult to the male-bodied individuals.”¹¹⁶ Ayiera’s analysis exposes the manipulation of discriminatory narratives imposed on women, girls, LGBTIQ, non-binary and gender non-conforming persons in sexual violence committed against cisgender, hetero-normative men. This violence targets victims who believe that the inequality these narratives uphold is justified, and they themselves are not subjected to their subordination in their normal lives. In this way, gender-based crimes are carried out to hurt victims by using oppressive gender narratives victims may otherwise benefit from.

For example, rape of men as a war strategy is regularly designed to subordinate, humiliate, and feminize men, casting them as too powerless to play stereotypical roles as protectors and reinforcing the gender discrimination messaging of emasculation and often homophobic shame. When hetero-normative men face stigma associated with sexual violence, part of the humiliation tactic is often to invoke the “indignity” of being treated as a woman or a homosexual. According to Zillah Eisenstein, “[m]en who are raped and sexually degraded are ‘humiliated’ because they are treated like women; they are forced to be women—sexually dominated and degraded.”¹¹⁷ The discrimination works to re-enforce pre-existing gender narratives assigned to women and LGBTIQ persons in an effort to abuse hetero-normative men who subscribe to them.

In 2004, the first photographs emerged of U.S. military personnel humiliating, abusing, and torturing detainees at Abu Ghraib prison in Iraq.¹¹⁸ The sexual violence acts employed at Abu Ghraib were not only used to emasculate victims, but also to evoke homophobic and religious shame. They represent an intersection of multiple forms of discrimination based on gender, religion, race and ethnicity. The gender narratives imposed by perpetrators requires victims to hold pre-existing beliefs in the subordination

¹¹⁶ EVE AYIERA, SEXUAL VIOLENCE IN CONFLICT: A PROBLEMATIC INTERNATIONAL DISCOURSE 17 (Urgent Action Fund, 2014); See also MenEngage Alliance, MENENGAGE.ORG (a global coalition that works with men and boys to promote gender equality).

¹¹⁷ Zillah Eisenstein, *Sexual Humiliation, Gender Confusion and the Horrors at Abu Ghraib*, WOMEN HUM. RTS. NETWORK 1 (Jul. 22, 2004).

¹¹⁸ Male detainees were kept naked for days at a time, arranged in sexually explicit positions and photographed; They were forced to masturbate themselves, wear women’s underwear on their heads and led to believe menstrual blood was being wiped on their faces. Steven Lee Myers, *The Reach of War: Detainees: Testimony from Abu Ghraib Prisoners Describes a Center of Violence and Fear*, N.Y. TIMES, May. 22, 2004. One Abu Ghraib Detainee stated, “They wanted us to feel as though we were women, the way women feel.” Mary Anne Case, *Gender Performance Requirements of the U.S. Military in the War on Islamic Terrorism as Violence by and against Women*, 102 AM. SOC’Y INT’L L. PROC. 269, 271 (2008).

of women and prohibition of homosexuality. A discrimination analysis shows how hetero-normative men may be subjected to gender persecution, but also demands recognition and redress for the larger underlying gender discrimination at work.

Perpetrators also use gender-based violence as a display of power to control men.¹¹⁹ For example, women have been raped as a strategy to humiliate men.¹²⁰ Sexual violence used in this way may not only amount to torture for women subjected to it, but also for the men forced to watch it.¹²¹

In this way, it is erroneous to group sexual violence committed against cisgender, hetero-normative men with sexual violence committed against women, girls, LGBTIQ, non-binary and gender non-conforming persons, without explaining how discrimination impacts these groups differently and based on their pre-existing vulnerability to oppression. This analysis also holds true when applied to crimes that may amount to gender persecution.

This is similar to important distinctions made under a nuanced racial justice analysis. In the United States context, African-Americans and Indigenous persons fall under the category of people of color (“POC”), but they are also held as distinct groups because of racism’s disparate impacts. The BIPOC Project explains that the term BIPOC (Black, Indigenous and persons of color) recognizes that in general, not all people of color face equal levels of injustice: “Specifically naming Black and Indigenous people signifies that Black and Indigenous populations are the ones who’ve suffered the most under white supremacy, imperialism, colonialism, classism, racial injustices and systemic oppression.”¹²² The distinction highlights how privilege and oppression work differently within the BIPOC community. Without this nuanced analysis, racial justice analyses run the risk of invisibilizing how the specific histories of anti-Black and anti-Indigenous biases contribute to racially-motivated crimes.¹²³ Similarly, a gender analysis

¹¹⁹ Jacob Zenn & Elizabeth Pearson, *Women, Gender and the Evolving Tactics of Boko Haram*, 5 J. OF TERRORISM RES. 51, 51 (2014).

¹²⁰ Boko Haram militia members, for example, have inflicted sexual violence against Christian women as part of a larger strategy to both punish women as well as humiliate Christian men who were powerless to protect them. *Id.*

¹²¹ *E.g.*, Prosecutor v. Al Hassan, Case No. ICC-01/12-01/18, ¶ 231 (forcing one person to witness the rape of another person may constitute a form of torture). This holding is in relation to Witness D in the *Furundžija* case who was subjected to psychological sexual torture when forced to watch sexual assault on a woman, which compounded by knowing her as a friend. See Patricia Viseur Sellers & Leo Nwoye, *Conflict-Related Male Sexual Violence and the International Jurisprudence*, SEXUAL VIOLENCE AGAINST MEN AND BOYS IN GLOBAL POLITICS (P. Drumond ed. Taylor & Francis Books, 2018) (citing Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T, Judgment (1998)).

¹²² The BIPOC Project, The BIPOCproject.org (last visited Apr. 22, 2021).

¹²³ Sandra E. Garcia, *Where Did BIPOC Come From?*, N.Y. Times, Jun. 17, 2020.

must consider how, for example, misogyny, homophobia and transphobia contribute to gender-based crimes.

That is not to say the sexual violence hetero-normative men experience is any less egregious or that it may not be gendered. Hetero-normative men are also subjected to harmful gender narratives that dictate rigid standards of masculinity and militarization.¹²⁴ Research demonstrates that, as with women, girls, LGBTIQ, non-binary and gender non-conforming persons, rates of sexual violence against men and boys are severely underestimated due to factors such as underreporting as a result of social stigma and poor detection by authorities not trained to recognize signs of sexual abuse in males.¹²⁵ The problem is significant; it deserves great attention and should be included in the solutions for addressing sexual and gender-based violence.

Despite the critical nuances a discrimination analysis provides, some advocates continue to conflate all sexual violence with gender-based violence. This, in turn, has contributed to the mistaken idea that international attention given to sexual violence committed against women and girls is in competition with, or entirely eclipses, attention given to men and boys as victims.¹²⁶

One study in particular has been cited multiple times as evidencing a failure to recognize sexual violence committed against men and boys in conflict.¹²⁷ The study states that out of 4,076 human rights nongovernmental organizations (NGOs) addressing sexual violence in both peace and conflict settings, only 3% mention the experience of males in their informational materials.¹²⁸ The study was conducted as part of a dissertation project about twenty years ago, reflecting the dominant view at the time of sexual violence as a “women’s issue.” Since then, the human rights landscape has changed.

¹²⁴ See CYNTHIA ENLOE, *MANEUVERS: THE INTERNATIONAL POLITICS OF MILITARIZING WOMEN’S LIVES*, 32-34 (2000) (discussing the privileging of masculinity and militarization).

¹²⁵ E.g., SARA FERRO RIBEIRO & DANAE VAN DER STRATEN PONTTHOZ, *INTERNATIONAL PROTOCOL ON THE DOCUMENTATION AND INVESTIGATION OF SEXUAL VIOLENCE IN CONFLICT: BEST PRACTICE ON THE DOCUMENTATION OF SEXUAL VIOLENCE AS A CRIME OR VIOLATION OF INTERNATIONAL LAW* 273 (2017).

¹²⁶ See, e.g., Anne Marie Goetz and Rachel Dore-Weeks, “What about the men? Frankly, it depends on why you’re asking”, *THE GUARDIAN* (Mar. 8, 2018), <https://www.theguardian.com/global-development/2018/mar/08/what-about-the-men-depends-why-youre-asking> (last visited Dec. 10, 2020) (discussing the mischaracterization of women’s rights advocates as prioritizing women victims over men).

¹²⁷ E.g., Laura Stemple, *Male Rape and Human Rights*, 60 *HASTINGS L.J.* 605, 612 (2009) (citing Augusta Del Zotto & Adam Jones, *Male-on-Male Sexual Violence in Wartime: Human Rights’ Last Taboo?* 8 (Mar. 2002) (unpublished paper presented at the Annual Convention of the Int’l Stud. Ass’n (ISA)).

¹²⁸ *Id.* Organizations studied were generally human rights organizations, some with women-focused departments; and, except for one organization from Uganda, all 4076 organizations were identified as “western groups.” Email correspondence with Augusta Del Zotto, June 15, 2018.

For example, more prominent organizations that work on conflict-related sexual violence mentioned in the study, such as World Health Organization, Amnesty International and UNHCR, have been reporting on rape committed against men and boys for years.¹²⁹ More pointedly, the author of the study notes that “[s]ince our [findings were] published nearly two decades ago, there has been a significant increase in discussion / research about male rape, including war rape.”¹³⁰

While addressing all sexual violence, regardless of the victim’s gender, should be the priority of the international community, the difference between sexual violence committed against, for example, normative, heterosexual men and gay men is critical to understand, since international law requires additional measures when responding to discrimination committed against protected groups. Discrimination reinforces a social hierarchy through oppression, restricting the rights for those at the bottom and guaranteeing rights for those at the top. As racial discrimination reinforces oppressive narratives through violence and other harms committed against Black, Indigenous and people of color, it also reinforces narratives that provide greater rights and freedoms to whites and other majority racial groups.¹³¹ Similarly, gender discrimination dictates oppression against women, girls, LGBTIQ, non-binary and gender non-conforming persons, ensuring greater privileges to cisgender, hetero-normative men.

3. *The risk associated with “gender blind” approaches to international law*

Gender-based violence eradication requires recognition of and redress for the underlying discrimination that dictates greater freedoms for some while curtailing them for others. A “color blind” approach to end violence does nothing to end racial discrimination and violence and may unwittingly

¹²⁹ E.g., WORLD HEALTH ORGANIZATION (WHO), REPRODUCTIVE HEALTH DURING CONFLICT AND DISPLACEMENT 111-12 (2000) (discussing men and boys as victims of sexual violence); AMNESTY INT’L, DEMOCRATIC REPUBLIC OF CONGO: MASS RAPE – TIME FOR REMEDIES, 18-19 (Oct. 2004) (noting “a hitherto unreported aspect of sexual violence is the large number of men who are also victims of sexual violence”); UNHCR, WE KEEP IT IN OUR HEART: SEXUAL VIOLENCE AGAINST MEN AND BOYS IN THE SYRIA CRISIS (October 2017); UNHCR, WORKING WITH MEN AND BOY SURVIVORS OF SEXUAL AND GENDER-BASED VIOLENCE IN FORCED DISPLACEMENT (2012).

¹³⁰ Email correspondence with Augusta Del Zotto, June 14, 2018 (on file with author).

¹³¹ See, e.g., HRGJ CLINIC OF CUNY SCH. OF L. ET AL., HUMAN RIGHTS VIOLATIONS AGAINST WOMEN AND GIRLS IN IRAQ: A REPORT FOR THE UNITED NATIONS HUM. RTS. COMMITTEE 30-32 (May 2020) (discussing discrimination and violence committed against Afro-Iraqis); HRGJ CLINIC OF CUNY SCH. OF L., MADRE & PROCESO DE COMUNIDADES NEGRAS (PCN), VIOLATIONS OF AFRO-COLOMBIAN WOMEN’S HUMAN RIGHTS: A REPORT FOR THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (2019) (discussing discrimination and violence committed against Afro-Colombian women and their communities).

perpetuate it.¹³² Similarly, a “gender blind” approach in writing or implementing statutory language prohibiting gender-based violence may erase the underlying discrimination and reinforce the institutionalized violence that upholds it. This works to further ensconce gender-based violence and its impunity under law.

A discrimination lens is necessary to root out violence, but is often overlooked when applying laws that are gender blind on their face. Moreover, gender-blind laws sometimes provide corrupt states abusive measures to willfully ignore gender-based crimes. For example, when questioned about why national jurisdictions lack anti-domestic violence laws, some state officials routinely point to general assault laws arguing that such violence is already outlawed, ignoring the gender discrimination that leaves domestic violence unreported, uninvestigated and otherwise unaddressed.¹³³

The use of gender-based violence to reinforce discriminatory gender narratives during times of both peace and conflict are interrelated, with one reinforcing the other, manifesting in the legalization of several gender-based harms that also occur during war. For example, 75 percent of countries still legalize forced or under-aged marriage;¹³⁴ 112 countries do not recognize marital rape as a crime;¹³⁵ 71 countries still criminalize homosexuality with 44 holding additional provisions explicitly criminalizing sexual activity between women;¹³⁶ and over 50 countries have gender-discriminatory

¹³² Helen A. Neville, *Color-Blind Racial Ideology: Theory, Training, and Measurement Implications in Psychology*, 68 AMERICAN PSYCHOLOGIST 455, 455 (Sept. 2013) (arguing that “racial color-blindness is unattainable, reinforces racial prejudices and/or inequality, and is actually an expression of ultramodern notions of racism among white Americans and of internalized racism or the adoption of negative racial stereotypes among people”).

¹³³ E.g., U.N. Committee on the Elimination of Discrimination Against Women, List of Issues and Questions In Relation to the Second Periodic Report of the Syrian Arab Republic, ¶ 10, U.N. Doc. CEDAW/C/SYR/Q/2 (Oct. 28, 2013) (questioning the Syrian government on measures taken to address domestic violence); Government of Syrian Arab Republic, Replies of the Syrian Arab Republic, ¶¶ 11-13, U.N. Doc. CEDAW/C/SYR/Q/2/Add.1 (Jan. 22, 2014) (responding to the Committee’s question by pointing out provisions in the Syrian Penal Code that prohibit general assault).

¹³⁴ *Women, Business and the Law*, THE WORLD BANK (2017), <https://wbl.worldbank.org/en/data/exploretopics/protecting-women-from-violence> (last visited Aug. 1, 2020).

¹³⁵ *SDG Atlas 2017: Gender Equality*, THE WORLD BANK (2017), <http://datatopics.worldbank.org/sdgatlas/archive/2017/SDG-05-gender-equality.html>.

¹³⁶ Map of Countries that Criminalize LGBT People, HUMAN DIGNITY TRUST, <https://www.human.dignitytrust.org/lgbt-the-law/map-of-criminalisation/> (last visited December 14, 2020). The majority of these countries explicitly criminalize sex between men; 15 countries criminalize gender identity and/or expression of transgender people; and 11 countries permit the death penalty for private, consensual same-sex sexual activity. *Id.*

provisions limiting women's rights to pass on nationality.¹³⁷ Instead of presuming to be "blind" to discrimination, lawmakers should work to uphold and protect the rights of all persons, at all times, while also recognizing and addressing the underlying discrimination that members of marginalized groups endure.

This lack of a discrimination analysis has also emerged in the recounting of historical movements for gender equality. For example, one scholar critiques the 1990s "women's rights as human rights" movement's focus on the recognition of violence against women as leading to the United Nation's framing of sexual violence as a "women's issue" and the exclusion of men's rape from the discourse.¹³⁸ The movement for the recognition of women's rights was not a movement for the recognition of new rights for women; it was a movement calling for equal rights—and recognition that human rights also apply to women and girls. The difference is critical to understand.

The framing of sexual violence as a "women's" or "private" issue, not worthy of serious attention, derives from the longstanding paradigm of women's subordination.¹³⁹ The 1990s "women's rights as human rights" movement emerged in response to this paradigm.¹⁴⁰ The recognition of sexual violence as a serious crime drew from the work of earlier civil rights and human rights activists such as Rosa Parks, as well as movements to address mass rapes.¹⁴¹ For example, movement building against sexual violence was a defining aspect of the mid-20th century civil rights movement in the United States, and a critical component in the fight against white supremacy.¹⁴² In another example, feminist activists in Bangladesh fought

¹³⁷ Twenty-five countries explicitly deny equal rights to women in passing on their citizenship to their children and over fifty countries still contain discriminatory provisions against women within their nationality laws. *Time for All Nationality Laws to Uphold Women and Men's Equality, Says UN and Civil Society Leaders*, UNHCR (Sept. 23, 2020), <https://www.unhcr.org/en-us/news/press/2020/9/5f6b183b4/time-nationality-laws-uphold-women-mens-equality-says-un-civil-society.html>.

¹³⁸ Stemple, *supra* note 127, at 626-27.

¹³⁹ See, e.g., International Committee of the Red Cross (ICRC), *The Geneva Convention Relative to the Protection of Civilian Persons in Time of War* Fourth Geneva Convention art. 27, 25 U.N.T.S. 287 (Aug. 12, 1949). Article 27 of the Fourth Geneva Convention frames rape as an attack on women's honor and dignity instead of as a fundamental rights violation.

¹⁴⁰ Bunch, *supra* note 48.

¹⁴¹ See DANIELLE L. MCGUIRE, *AT THE DARK END OF THE STREET: BLACK WOMEN, RAPE, AND RESISTANCE—A NEW HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM ROSA PARKS TO THE RISE OF BLACK POWER* (Vintage Books ed. 2011) (discussing the ritualized rape of Black women as part of the southern white supremacy strategy and the movement that exposed it). "Issues of sexual violence were crucial both to the civil rights movement and to the white supremacist resistance These battles . . . exposed the power of sex in maintaining the South's racial hierarchy and underscored the extent to which whites would fight to preserve it." *Id.* at 47.

¹⁴² *Id.*

for decades before they saw the beginnings of justice for the hundreds of thousands of women raped during the 1971 war for independence.¹⁴³

The 1990s feminist movement also included LGBTIQ rights in their demands, although not at the same scale as the feminist movement does today.¹⁴⁴ The movement contributed significantly to the successful struggle to secure the legal recognition of rape as torture, which also recognizes sexual violence committed against men.¹⁴⁵ In these ways and more, earlier feminist movements helped to lay the foundation for the recognition of not only women's but also LGBTIQ rights that would develop over the proceeding decades.¹⁴⁶

Despite the condemnation of gender-based discrimination under international law, its practice by countries around the world persists. As feminist scholar Charlotte Bunch noted some thirty years ago, female subordination runs so deep that gender-based violence is still viewed as “inevitable” or “natural”¹⁴⁷ rather than seen as a politically constructed reality maintained by patriarchal interests, anti-gender rights ideology, and authoritarianism. This remains true today. The result has been the historical trivialization and obscuring of what constitutes gender-based violence. The binary and patriarchal framing of sexual violence as a “women’s issue” has further ensconced the institutionalization of gender discrimination against women and girls and the invisibilization of LGBTIQ non-binary and gender non-conforming persons’ rights. To this day, advocates pressing for the elimination of all sexual and gender-based violence still struggle for recognition and accountability for what is sometimes dismissed as a “women’s issue.”¹⁴⁸

¹⁴³ CAITLIN REIGER, FIGHTING PAST IMPUNITY IN BANGLADESH: A NATIONAL TRIBUNAL FOR THE CRIMES OF 1971 2 (2010). *See also* The Int’l Crimes (Tribunals) Act No. XIX of 1973, at 3(2)(a), July 20, 1973.

¹⁴⁴ *See, e.g.*, Gail Hershatter, Emily Honig & Lisa Rofel, *Reflections on the Fourth World Conference on Women, Beijing and Huairou, 1995*, 23 SOC. JUST. 368, 372-73 (1996) (describing the activities of the International Gay and Lesbian Human Rights Commission (now known as OutRight Action Int’l) at the Fourth World Conference on Women in Beijing). *See also* *Participants Who Were in Beijing*, LESBIANS FREE EVERYONE, <https://www.lesbiansfreeeveryone.org/backpacks> (documenting the participation of lesbian activists from around the world in the U.N. 4th World Conference on Women in Beijing China and their fundamental role in the recognition of the diversity of women, including LGBTIQ women).

¹⁴⁵ *See* Davis, *Gendered Dimensions of Torture*, *supra* note 103, at 372.

¹⁴⁶ *See, e.g.*, beginning of Section I discussing the inclusion of gender persecution in the Rome Statute as just one example of the feminist movement advocating for LGBTIQ rights alongside women’s rights.

¹⁴⁷ Bunch, *supra* note 48, at 491.

¹⁴⁸ *See, e.g.*, INT’L FED’N FOR HUM. RTS., SEXUAL AND GENDER-BASED VIOLENCE: A GLOSSARY FROM A TO Z 8 (2020) (noting that all forms of “sexual and gender-based violence being considered ‘merely as a women’s issue’ and dismissed as a ‘lesser’ crime or a crime that is difficult to ‘identify and prosecute’.”).

However, while institutionalized gender-based violence and discrimination remains a challenge, the feminist movement continues to enjoy wins. For example, the movement's advocacy shifting the discourse language from "violence against women" to "gender-based violence" was done in large part to capture the gendered nature of crimes experienced by all persons vulnerable to gender discrimination, notably LGBTIQ persons, and more recently non-binary and gender non-conforming persons. Julie Goldscheid explains, "Despite its history as a political and organizing tool, the 'violence against women' frame is problematic [. . .] and reinforces a binary view of gender that is inconsistent with queer, feminist and other critical theory."¹⁴⁹ The term 'gender-based violence,' while gender-neutral on its face in that it does not expose the gender identity of the victim or perpetrator, encompasses gender discrimination.¹⁵⁰

And, while it is problematic to group sexual violence committed against hetero-normative, cisgender men with gender-based violence committed against LGBTIQ persons and others without examining the experience and impact of gender discrimination, it is important to address all sexual and gender-based violence.

A sexual and gender-based violence analysis must include a contextual and legal analysis of gender discrimination to identify and uncover its causes. Without it, a sexual violence analysis risks taking a gender-blind approach to redress, which may omit, and thereby enforce, oppressive gender narratives that justify and normalize routine violence and discrimination that women, girls, LGBTIQ, non-binary and gender non-conforming persons have historically and persistently suffered. For example, crimes such as marital rape and forced marriage may be ignored or unrecognized if the sexual violence analysis applied to them fails to account for discriminatory beliefs about women's and girls' roles and duties. Similarly, as described above, the removal of a gender discrimination lens from analysis of domestic violence is the means through which some governments justify a refusal to enact anti-domestic violence laws, cynically claiming they already address gender-based violence through general assault laws.

II. APPLYING A GENDER PERSECUTION LENS

A perpetrator's intent to commit gender-based crimes amounting to persecution does not happen in a vacuum. The intent to discriminate derives from pre-existing gender narratives, including those that intersect with other discriminatory narratives that compound oppression. For example,

¹⁴⁹ Julie Goldscheid, *Gender Neutrality, the "Violence Against Women" Frame, and Transformative Reform*, 82 UMKC L. REV. 623, 625 (2014).

¹⁵⁰ *Id.* at 630-31.

intertwining racial and gender ideologies have fueled sexual violence against women and girls who are racial or ethnic minorities.¹⁵¹ A full examination of such acts—acts which have taken place in a wide variety of conflicts (if not the majority of conflicts) throughout history and across the globe—is beyond the scope of this article. Instead, this article focuses on four conflict examples that exemplify a geographical and historical range demonstrating similar or identical patterns of gender-based crimes committed by armed actors that may amount to persecution.

Examining gender-based crimes that may amount to gender persecution provides a new framework for understanding the root causes of conflict. Substantial literature on the UN Women, Peace and Security (“WPS”) agenda provides in-depth analysis on the structural and societal indicators of gender inequality in conflict contexts.¹⁵² Less discussed is the anti-rights gender ideology of the perpetrators who commit atrocities. Pablo Castillo Díaz and Nahla Valji’s review of scholarly work unpacking the discourse on men and sexual violence found that the vast majority of literature does so from the perspective of “aggrieved masculinity” as opposed to perpetrator ideology.¹⁵³ Scholarship consequently defaults to socio-cultural-economic drivers as the root causes of gender-based violence, which inadvertently invisibilizes the discriminatory intent behind gender-based crimes. Castillo Díaz and Valji argue that the rationalization of male violence in conflict as driven by societal and economic pressures results in “over-privileging a narrative of men’s struggles and disaffection to the detriment of those experienced by women.”¹⁵⁴ This presumption of sexual violence as a socio-economic consequence also amplifies the “inevitability” narrative about rape and shrouds discrimination as a driver to conflict-related gender-based harms. The result is a lack of investigation and accountability for gender-based crimes including those that may amount to persecution.

This framework of gender persecution requires a careful examination of fundamental rights deprivations committed during conflicts and other atrocities, particularly against women, girls, LGBTIQ, non-binary and gender non-conforming persons. Gender persecution may manifest as punishments for transgressing prescribed gender narratives, inflicted, for example, on men perceived as behaving “effeminately” or on women perceived as behaving “manly” or for deviating from mandatory dress codes

¹⁵¹ Davis, *Reimagining Justice*, *supra* note 28, at 532-33.

¹⁵² Pablo Castillo Díaz & Nahla Valji, *Symbiosis of Misogyny and Violent Extremism*, 2 COLUM. J. OF INT’L. AFFAIRS, 37, 39.

¹⁵³ *Id.* at 40.

¹⁵⁴ *Id.*

or occupations.¹⁵⁵ This section begins with a historical look at the treatment of women and LGBTIQ persons by the Nazi Regime during WWII and then shifts to the recent conflicts of the Islamic State of Iraq and Syria (ISIS) in Iraq, armed actors in Colombia's conflict, and Ansar al-Dine and al-Qaeda in the Islamic Maghreb (AQIM) in Mali.

*A. Gender-based persecution during World War II in Germany*¹⁵⁶

In 2008, the Memorial to Homosexuals Persecuted under the National Socialist Regime (the Nazi party) was unveiled in the Tiergarten district of Berlin.¹⁵⁷ The memorial displays a short-looped video of two men locked in a kiss. Slated to change every couple of years, a video of two lesbians kissing was proposed, causing considerable controversy from some historians who argued that lesbians were not targeted for persecution during the Holocaust.¹⁵⁸

While not near the considerable documented numbers of perceived or actual gay men persecuted by the Nazis, there are historical accounts of lesbians, transgender, and gender non-conforming persons enduring deprivations of fundamental rights that amount to persecution.¹⁵⁹ Understanding how these individuals and groups were targeted and why they have been missed by history requires a closer examination of the layers of discrimination forced on women and LGBTIQ persons by the Nazi regime.

At the turn of the twentieth century, a devastated Germany began promulgating a racist and homophobic ideology under the direction of the Nazi party. Queerness, and most notably male homosexuality, challenged the patriarchal order and was viewed as a threat to the so-called "Aryan" race.¹⁶⁰ "Might makes right" became a Nazi rally call for exercising moral values of strength and discipline, derived from militarism and masculinity.¹⁶¹ When questioned about the party's position on homosexuality, members replied, "We reject anything which emasculates our people and makes it a plaything

¹⁵⁵ Davis, *Reimagining Justice*, *supra* note 28, at 524-30.

¹⁵⁶ Crimes amounting to gender-based persecution also took place in other countries during World War II (WWII). Most notable was the abuse of the "Comfort Women" who were mainly women and girls forced into sexual enslavement by the Japanese military. *See* Sellers, *Wartime Female Slavery*, *supra* note 19, at 117-25 (discussing WWII and the "Comfort Women").

¹⁵⁷ *Germany Unveils Memorial to Gay Victims of Holocaust*, N.Y. TIMES, May 27, 2008.

¹⁵⁸ *Lesbian Holocaust Memorial Plan Upsets Historians*, THE LOCAL DE (Mar. 25, 2010, 3:40 PM), <https://www.thelocal.de/20100325/26127>.

¹⁵⁹ At the time of this writing, there were no documented cases known to the author of gender-based harms committed by Nazi members against persons based on their sex characteristics, which is not to say such acts did not take place.

¹⁶⁰ Laurie Marhoefer, SEX AND THE WEIMAR REPUBLIC: GERMAN HOMOSEXUAL EMANCIPATION AND THE RISE OF THE NAZIS 151-54 (2015) [hereinafter Marhoefer, SEX AND THE WEIMAR REPUBLIC].

¹⁶¹ *Id.* at 152.

for our enemies Let's see to it that we once again become strong! . . . We therefore reject any form of lewdness, especially homosexuality"¹⁶²

At its core, Nazi anti-gender rights ideology reflects a hetero-normative framework that celebrates misogynist and homophobic concepts labeled as "traditional family" values.¹⁶³ Men were expected to maintain a role of "manly excellence."¹⁶⁴ Some high-ranking Nazi officials denounced homosexuality as "a dangerous and infectious plague" that should be met with "barbaric severity."¹⁶⁵ Party members went so far as calling for "the fight for the extermination of homosexuality among the German people"¹⁶⁶ in order to "keep clean of the vermin of the homosexual nature"¹⁶⁷ and to eliminate "the potential for a homosexual conspiracy to take over the state."¹⁶⁸ The condemnation of homosexuality was considered necessary, since it was believed to perpetuate a "womanish emotionalism" that, if left unchecked, would run rampant among men.¹⁶⁹

Nazi ideologues also railed against the "masculinization" of "Aryan" women.¹⁷⁰ In their worldview, women were transgressing gender norms when they performed masculinity in their dress and other behaviors. In accordance with hetero-normative patriarchal ideology, discriminatory gender narratives assigned to women and homosexuals intertwined to form a foundation for the Nazi anti-gender rights ideology that pathologized them through their sexuality and gender.

Nazi members also interwove racial, ethnic, and gender prescriptions. Some viewed homosexuals as racial degenerates, stemming from the "evil propensities of the Jewish soul" and the "typically inferior aberrations of Syrians."¹⁷¹ Hitler's official newspaper declared that, "The Jews are forever trying to propagandize sexual relationships between siblings, men and animals, and men and men These efforts are nothing but vulgar,

¹⁶² *Id.*

¹⁶³ Geoffrey J. Giles, *The Denial of Homosexuality: Same-Sex Incidents in Himmler's SS and Police*, 11 J. HIST OF SEXUALITY 260, 260 (2002).

¹⁶⁴ *Id.* at 266-67.

¹⁶⁵ *Id.* at 267, 269.

¹⁶⁶ *Id.* at 269.

¹⁶⁷ *Id.* at 270.

¹⁶⁸ *Id.* at 268.

¹⁶⁹ *Id.* at 260.

¹⁷⁰ Marhoefer, SEX AND THE WEIMAR REPUBLIC, *supra* note 160, at 74.

¹⁷¹ Harry Oosterhuis, *Male Bonding and the Persecution of Homosexual Men in Nazi Germany*, 17 AMSTERDAMS SOCIOLOGISCH TIJDSCHRIFT 27, 29 (1991). It should be noted that Oosterhuis also contends that Nazi racism does not explain its homophobic regulations as most Nazis likely considered homosexuality a social disease. *Id.* at 29-30.

perversed crimes and we will punish them by banishment or hanging.”¹⁷² Similarly, women who displayed androgynous or masculine behavior in their gender expression were seen as contributing to racial degeneracy. Under Nazi ideology these non-conforming behaviors in gender and sexuality were not only violating gender mores, but also racial and political norms.¹⁷³

By 1933, the Third Reich began targeting homosexual men.¹⁷⁴ Nazism called for the extermination of homosexuality, which manifested in the criminalization of male-male sex and the creation of a special police division to enforce it.¹⁷⁵ Police were ordered to create lists of suspected homosexual men, often referred to today as “pink lists.”¹⁷⁶ Nazis ordered the arrest of gay men, or men perceived as gay, under paragraph 175 of the German criminal code which banned sexual relations between men.¹⁷⁷ Tried for their crimes and sent to prison, many ended up in concentration camps.¹⁷⁸ While in the camps, homosexuals were “often singled out for special tortures and dangerous work.”¹⁷⁹ Most were worked to death.¹⁸⁰ Overall, between 5,000 and 15,000 men accused of homosexuality were sent to concentration camps and marked by pink triangle badges.¹⁸¹ By the end of World War II, over 100,000 persons had been tried for homosexual activity by the Nazi regime.¹⁸²

Less is known about the ill-treatment of lesbians and transgender persons during the rule of the Third Reich. Police were also charged with

¹⁷² Alycia T. Feinde, *Reconciling Sexual Orientation: Creating a Definition of Genocide that Includes Sexual Orientation*, 3 MICH. ST. J. INT’L L. 197, 201 (2005).

¹⁷³ Laurie Marhoefer, *Lesbianism, Transvestitism, and the Nazi State: A Microhistory of a Gestapo Investigation, 1939–1943*, 121 AM. HIST. REV. 1167, 1176 (2016) [hereinafter Marhoefer, *Lesbianism, Transvestitism, and the Nazi State*].

¹⁷⁴ Robert G. Moeller, “*The Homosexual Man Is a ‘Man,’ the Homosexual Woman Is a ‘Woman’*”: Sex, Society, and the Law in Postwar West Germany, 4 J. HIST. OF SEXUALITY 395, 401 (1994).

¹⁷⁵ CLAYTON JOHN WHISNANT, QUEER IDENTITIES AND POLITICS IN GERMANY: A HISTORY, 1880-1945 103-104 (2016).

¹⁷⁶ *Id.*

¹⁷⁷ *Persecution of Homosexuals in the Third Reich*, HOLOCAUST ENCYCLOPEDIA, <https://encyclopedia.ushmm.org/content/en/article/persecution-of-homosexuals-in-the-third-reich> (last visited Dec. 10, 2020).

¹⁷⁸ Erwin J. Haeberle, *Swastika, Pink Triangle and Yellow Star: The Destruction of Sexology and the Persecution of Homosexuals in Nazi Germany*, HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST 375, 375 (1989) (noting how some homosexuals in prominent positions were intentionally overlooked).

¹⁷⁹ *Id.* at 376.

¹⁸⁰ *Id.*

¹⁸¹ Erik N. Jensen, *The Pink Triangle and Political Consciousness: Gays, Lesbians, and the Memory of Nazi Persecution*, 11 J. HIST. OF SEXUALITY 319, 344 n.122 (2002) (citing Richard Lautman, “Der rosa Winkel in den nationalsozialistischen Konzentrationslagern,” in Seminar: Gesellschaft und Homosexualität I Frankfurt am Main, 1977], 333). Ric).

¹⁸² *Persecution of Homosexuals in the Third Reich*, *supra* note 177.

collecting information about lesbians, but the volume and consequences of their investigations are not as well documented.¹⁸³ Laurie Marhoefer notes that prominent historians still disagree on whether the Nazis' harassment, detention, or other harms committed against lesbians and transgender men amounted to persecution,¹⁸⁴ reflecting a lack of understanding and dearth of jurisprudence on gender persecution. Since lesbianism was never officially criminalized, the number of women accused of lesbianism and prosecuted is unknown. While not comparable to the numbers of gay men tried, there are accounts of lesbians and transgender persons being arrested and either sent to prison or to concentration camps. In one case, when six lesbians were sent to a concentration camp, guards handed the women over to a group of male war prisoners stating, "These ones are the lowest form of life" and promising each of the men a bottle of alcohol in return for raping the women.¹⁸⁵ These instances taken together and analyzed under a broader gender discrimination framework shows that those who transgressed Nazi gender regulations, including women perceived as lesbians, transgender persons and other gender non-conformers, were subjected to a pattern of fundamental rights deprivations, amounting to persecution.

Understanding why lesbians and transgender persons were prosecuted in fewer numbers, and how Nazi anti-gender rights ideology evolved, requires turning the clock back to before the World Wars. Social order was a defining characteristic of Europe at the turn of the nineteenth century, with class and status visibly identifiable through well-defined dress codes and gender roles.¹⁸⁶ As Claudia Schoppmann notes, "[a]ny self-determining female sexuality, including lesbian forms, was unthinkable within a centuries-old patriarchal tradition that identified passivity as a female sexual characteristic."¹⁸⁷ While women were prescribed rigid gender roles, lesbianism was of less concern than male homosexuality, since women were not considered full citizens and were stripped of multiple rights, including

¹⁸³ Claudia Schoppmann, *The Position of Lesbian Women in Nazi Germany*, in HIDDEN HOLOCAUST? GAY AND LESBIAN PERSECUTION IN GERMANY 1933-45, 13 (Gunter Grau ed., 1995). Police were told to watch for transgender persons as well although they were often misidentified as homosexuals. See discussion later in this section. E.g., Patrick Kelleher, *Why the heinous crimes committed by the Nazis against thousands of queer people must never, ever be forgotten*, PINK NEWS (Jan. 27, 2021), <https://www.pinknews.co.uk/2021/01/27/holocaust-memorial-day-lgbt-gay-pink-triangle>.

¹⁸⁴ Marhoefer, *Lesbianism, Transvestitism, and the Nazi State*, *supra* note 173, at 1167-68.

¹⁸⁵ GUNTER GRAU, HIDDEN HOLOCAUST? GAY AND LESBIAN PERSECUTION IN GERMANY 1933-45 (Gunter Grau ed., Patrick Camiller trans., 1995) 83-85.

¹⁸⁶ Marhoefer, *Lesbianism, Transvestitism, and the Nazi State*, *supra* note 173, at 1181-82.

¹⁸⁷ Schoppmann, *supra* note 183, at 9.

the right to confer their German nationality¹⁸⁸ to their children.¹⁸⁹ Men on the other hand, held the dominant power in society and politics. Seen as a greater threat to the status quo, pre-Weimar lawmakers focused on criminalizing homosexuality of men more than women through stringent measures such as anti-sodomy laws.¹⁹⁰

Before the destruction brought on by World War II and the rise of fascism along with it, the 1920s had begun to usher in greater acceptance and rights for women and LGBTIQ persons.¹⁹¹ Women gained the right to vote and queer folks enjoyed greater public acceptance.¹⁹² The right wing responded by consolidating support for the Nazis. Party ideologues revitalized misogynist, homophobic and transphobic beliefs in the wake of Germany's post-World War I devastation. Gay men were viewed as highly threatening based on the premise that men should hold power while women were relegated to second-class citizenship. After winning the election in 1933, Nazi members immediately moved to ban gay bars, night clubs and social organizations frequented by LGBTIQ persons, as well as "obscene literature" such as magazines and other publications that helped to define LGBTIQ subculture.¹⁹³ The Nazis all but decimated the women's movement with the dissolution of associations fighting for equal rights, which were thought to undermine the traditional family roles assigned to women.¹⁹⁴

Nazi propagandists ran major media campaigns redefining women's role as "breeders" who shouldered the responsibility to populate the "Aryan" race.¹⁹⁵ Gender narratives depicted women as subservient, feminine wives who should not take on employment and instead fulfill their destinies as mothers and caretakers. Women in politics were seen as "disgraceful aberrations" and were told that "only a man must be and remain a judge, soldier, and politician."¹⁹⁶ Masculine women were seen as threatening in their gender nonconformity, which was believed to lure women away from their assigned roles, endangering the birth rate and ultimately encouraging the

¹⁸⁸ Children born between 1914-74 were granted German citizenship if they were born in wedlock and their father was a German citizen at the time of their birth. *Obtaining German Citizenship*, GERMAN MISSIONS IN THE UNITED STATES, <https://www.germany.info/us-en/service/03-Citizenship/german-citizenship-obtain/919576> (last visited Dec. 10, 2020).

¹⁸⁹ See Marhoefer, *SEX AND THE WEIMAR REPUBLIC*, *supra* note 160, at 72.

¹⁹⁰ *Id.* (noting that, in the 1900s, many European countries had laws criminalizing sodomy but not female-female sex with the exception of Austria).

¹⁹¹ Giles, *supra* note 163, at 289.

¹⁹² *Id.*

¹⁹³ *Id.*; Schoppmann, *supra* note 183, at 12-13.

¹⁹⁴ Schoppmann, *supra* note 183, at 9.

¹⁹⁵ Haerberle, *supra* note 178, at 372.

¹⁹⁶ *Id.*

women's emancipation movement.¹⁹⁷ Hardliners called for women's dress and performance to be feminine and submissive, and for women to avoid wearing clothes such as pants, unless for exercise.¹⁹⁸ One philosopher went so far as to advocate for raping masculine-performing women in order to "cure" them.¹⁹⁹ Some called for criminalizing lesbianism,²⁰⁰ but ultimately this idea died out, since women were perceived as having little power and therefore not politically or socially threatening.²⁰¹ While not officially criminalized, there were legal grounds for prosecuting women for same-sex sexual behavior. Marhoefer notes that the performance of gender non-conformity by women and transgender men sometimes resulted in their being harassed, terrorized, and subjected to state violence.²⁰² With no explicit legal prohibition of lesbianism, police applied the "asocial" designation (represented by the black triangle badge in concentration camps) to those caught breaking gender prescriptions.²⁰³

Transgender persons were seen as intentionally misrepresenting their sex assigned at birth, as opposed to living as their true selves. It was incomprehensible in the Nazi view that a cisgender man would voluntarily give up his male societal privilege for any reason other than to commit fraud, which in turn, threatened the white hetero-normative social order.²⁰⁴ At the time, there was a smattering of criminal cases that recorded men dressing in women's clothing as a disguise for pickpocketing and at least one case of a girl dressing as a boy so she could attend school.²⁰⁵ The conclusion was that transgender persons must therefore be adept at deception and deceit, making them likely spies.²⁰⁶ Police were told to "pay special attention to transvestites and to deliver them to the concentration camp if necessary."²⁰⁷ This

¹⁹⁷ Marhoefer, *SEX AND THE WEIMAR REPUBLIC*, *supra* note 160, at 74.

¹⁹⁸ Marhoefer, *Lesbianism, Transvestitism, and the Nazi State*, *supra* note 173, at 1176.

¹⁹⁹ Schoppmann, *supra* note 183, at 10.

²⁰⁰ Section 175 of the criminal code criminalized male homosexuality in Germany. Moeller, *supra* note 174, at 396.

²⁰¹ Marhoefer, *Lesbianism, Transvestitism, and the Nazi State*, *supra* note 173, at 1177. Marhoefer cites to other homophobic beliefs held by the Nazis that also contributed to the disinterest in criminalizing lesbianism: "While homosexuality wasted a man's potency . . . the woman who is inclined to lesbianism was 'nevertheless capable of reproducing,'" and, "unlike the man, the woman is always ready for sex." *Id.* "[L]esbian sex had little significance because it did not involve penetration with a penis and was unlikely to lure anyone away from heterosexuality permanently," "Lesbianism was a substitute for sex. If offered the real thing under agreeable conditions, many women would gladly take it." Marhoefer, *SEX AND THE WEIMAR REPUBLIC*, *supra* note 160, at 74-75.

²⁰² Marhoefer, *Lesbianism, Transvestitism, and the Nazi State*, *supra* note 173, at 1169.

²⁰³ Jensen, *supra* note 181, at 334.

²⁰⁴ Marhoefer, *Lesbianism, Transvestitism, and the Nazi State*, *supra* note 173, at 1181-82.

²⁰⁵ *Id.* at 1181.

²⁰⁶ *Id.* at 1180.

²⁰⁷ Kelleher, *supra* note 183.

sometimes resulted in their mere existence being reported as a crime by neighbors and rounded up by police for questioning, which sometimes resulted in prosecution and imprisonment or being sent to concentration camps.²⁰⁸

Some historical records listed transgender persons as homosexuals and not as transgender.²⁰⁹ There are also documented cases of cisgender women tried on the pretext of other crimes in order to punish their alleged homosexuality,²¹⁰ but not enough research has been conducted to know the true extent of this practice. In at least one documented case, a cisgender woman was sent to a concentration camp and placed with political prisoners on the grounds of lesbianism, but nothing else is known about her.²¹¹ In another case, a transgender man was sent to a concentration camp for just under a year for “endangering public safety and order.”²¹² These prescribed gender regulations were enough to condemn lesbians, transgender people and gender non-conforming persons to either live in secrecy or risk being sent to the camps. Some women were coerced into changing their gender performance to conform to the Nazis’ gender norms; others felt coerced into heterosexual marriages, enduring the psychological harm of being forced into leading a double life.²¹³

WWII trials established that acts such as denying Jewish persons the right to education or employment opportunities or even choice of spouse are forms of religious persecution.²¹⁴ This has been echoed in tribunal jurisprudence today.²¹⁵ It follows that controlling where or whether cisgender women, lesbians or transgender persons work, who they marry, whether they have children, or how they dress, and punishing their transgressions through the severe deprivation of rights including harassment, arrest, or being sent to prison or to concentration camps may amount to gender persecution. Stripped of their rights to equality, cisgender women and transgender men were viewed as less threatening than their transgender women or male homosexual counterparts, who were deemed to have transgressed heteronormative male privilege. Consequently, men accused of homosexuality were persecuted in greater numbers, but the true numbers and stories of the

²⁰⁸ Marhoefer, *Lesbianism, Transvestitism, and the Nazi State*, *supra* note 173, at 1169-79.

²⁰⁹ *Id.* at 1178.

²¹⁰ Schoppmann, *supra* note 183, at 13.

²¹¹ *Id.*

²¹² Marhoefer, *Lesbianism, Transvestitism, and the Nazi State*, *supra* note 173, at 1179.

²¹³ Schoppmann, *supra* note 183, at 11.

²¹⁴ *Prosecutor v. Kvočka*, IT-98-30/1-T, Judgment, ¶ 186 (Nov. 2, 2001) (citing *United States v. Ernst von Weizsaecker*, XIV Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law n.10, 471).

²¹⁵ *Id.*

women, girls, lesbians, bisexuals, transgender, intersex, non-binary and gender non-conforming persons persecuted by the Nazis are unknown. A gender discrimination analysis unearths how Nazi anti-gender rights ideology targeted women, gay men, and LGBTIQ persons²¹⁶ for oppression, exacerbating pre-existing misogynist, homophobic, and transphobic narratives, while also intertwining those with racial and ethnic narratives to create multiple forms of oppression that reinforced tyranny. Work still needs to be done by historians to reexamine the court documents along with personal letters, diaries, and other story-telling materials that would bring light to these invisible victims.

B. Gender-based persecution in conflicts today

In 2014, crimes against LGBTIQ people in conflict became widely visible when ISIS²¹⁷ shocked the world with horrendous videos, shared through social media, of alleged gay men being thrown off buildings.²¹⁸ As horrific crimes committed against men accused of homosexuality spread across the internet, ISIS militia members imposed oppressive gender regulations with brutal penalties on all people under their control. Women and girls were forced into marriages or enslaved.²¹⁹ Women suffered torture when they removed their gloves or veils;²²⁰ young men endured abuse for having stylish haircuts, wearing western-style clothing or for being unwilling or unable to grow beards;²²¹ and warrants were issued for lesbians' executions.²²² Militia members created an ethnic, religious, and anti-gender rights ideology that provided the blueprints for the widespread and systematic oppression of those trapped under their rule.

ISIS is not alone in committing gender-based crimes. In conflicts across the globe, from Iraq to Colombia, armed actors have perpetrated gender-based crimes to reinforce discriminatory and oppressive gender prescriptions. Armed groups promulgate fear by using gender-based violence to control women and girls, by punishing gender non-conformers,

²¹⁶ MARHOEFER, SEX AND THE WEIMAR REPUBLIC, *supra* note 160, at 151-54.

²¹⁷ Also referred to as Islamic State of Iraq and the Levant (ISIL) and the Islamic State (IS).

²¹⁸ HRGJ CLINIC OF CUNY SCH. OF L. ET AL., *supra* note 20, ¶¶ 67-73.

²¹⁹ *Id.* ¶¶ 72-83; U.N. Hum. Rts Council, "They came to destroy": ISIS Crimes Against the Yazidis, ¶¶ 55-58, U.N. Doc. A/HRC/32/CRP.2 (June 15, 2016).

²²⁰ The veil has often been seen as a way to show modesty and sexual unavailability, and some women choose to wear the veil for these reasons. However, like all mandatory dress codes, forcing women to wear veils, or not to wear veils, including in highly specific ways may constitute a form of gender discrimination and, when enforced through the deprivation of fundamental rights, a gender-based crime. See Aisha Wood Boulanouar, *The Notion of Modesty in Muslim Women's Clothing: An Islamic Point of View*, 8 NEW ZEALAND JOURNAL OF ASIAN STUDIES 135 (Dec. 2006).

²²¹ HRGJ CLINIC OF CUNY SCH. OF L. ET AL., *supra* note 20, ¶ 83.

²²² *Id.* ¶ 61.

and by eradicating LGBTIQ persons. Armed groups in Colombia have been known to order women to cover their bodies and prohibit men from having long or dyed hair or wearing earrings.²²³ Under AQIM, women in Mali were forced to wear full, face-covering veils,²²⁴ prohibited from interacting with men to whom they were not married or otherwise related to,²²⁵ and barred from enacting certain fundamental rights, such as voting,²²⁶ because it was in violation of the militia's anti-gender rights ideology.²²⁷ These are just a few of the numerous examples of gender regulations imposed by armed actors and enforced through violence. What these crimes have in common is the intent to impose prescribed gender narratives through gender-based crimes that amount to persecution, stripping away fundamental rights and enforcing systems of oppression.

1. *ISIS gender-based crimes in Iraq*

One of the most systematically organized gender policies known to be commissioned by an armed group was created by ISIS.²²⁸ The Al-Khanssaa Brigade, a unit of ISIS mandated to enforce gender roles and other societal rules, created a manifesto on gender performance for women and girls.²²⁹ Drawing on a patriarchal religious interpretation, it frames women's oppression as a "divinely appointed right."²³⁰ According to the manifesto, the root of all injustice is the emasculation of men created by the confusion of women's and men's roles. Accordingly, it dictates women's true purpose: to serve men as mothers and household caretakers, allowing men to live up to their "rightful masculinity."²³¹

²²³ Inter-American Commission on Human Rights (IACHR), *Violence and Discrimination Against Women in the Armed Conflict in Colombia*, ¶¶ 98-99, OEA/Ser.L/V/II (Oct. 18, 2006); Tribunal Superior de Medellín [T. Sup.] [Superior Tribunal of Medellín], Sala. Just. y Paz febrero 2, 2015, Sentencia 110016000253200680018 (p.1331-33) (Colom.) [hereinafter Ramiro Vanoy Murillo case].

²²⁴ U.N. Hum. Rts Council, *Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Mali*, ¶¶ 26, 44, U.N. Doc. A/HRC/22/33 (Jan. 7, 2012); Stanford Univ., *Mapping Militant Organizations: Ansar Dine*, CENTER FOR INTERNATIONAL SECURITY AND COOPERATION, <https://cisac.fsi.stanford.edu/mappingmilitants/profiles/ansar-dine> (last visited Aug. 1, 2020).

²²⁵ Hum. Rts Watch, *MALI CONFLICT AND AFTERMATH: COMPENDIUM OF HUMAN RIGHTS WATCH REPORTING (2012-2017)* 117 [hereinafter MALI CONFLICT].

²²⁶ *Id.* at 8.

²²⁷ *Id.* at 8, 128-29, 140, 146-48, 170; See also Jonathan O'Donohue et al., *Gender-Based Persecution as a Crime against Humanity: The Road Ahead*, 17 J. OF INT'L CRIM. JUST. 957 (2019) (discussing the definition of gender under international criminal law in response to gender persecution charges filed in *The Prosecutor v. Al Hassan* case).

²²⁸ For a discussion on ISIS' gender-based crimes as gender persecution, see Davis, *Reimagining Justice*, *supra* note 28, at 513-19.

²²⁹ WOMEN OF THE ISLAMIC STATE, *supra* note 20, at 17.

²³⁰ *Id.* at 7.

²³¹ *Id.*

Followed by thousands, ISIS anti-gender rights ideology permits girls to be married off at the age of nine, calls for the death penalty for women who have held professional jobs,²³² assigns strict dress codes for men and women, and doles out harsh penalties for non-compliance. When caught out of the required dress even within the privacy of their own homes, or unaccompanied by a man in public, women have been beaten with sticks²³³ and tortured with a flesh cutting instrument coined “the biter.”²³⁴ Women doctors and nurses who removed their gloves in order to perform medical duties were severely beaten as were women and girls who failed to wear gloves or veils in public spaces.²³⁵ In one case, Al-Khanssaa Brigade members beat a pregnant woman to death for lifting her *niqab* to drink water.²³⁶

Also well-known is the militia’s widespread use of enslavement and the slave trade as part of a larger plan to impose gender regulations and control the ethno-religious make-up of future generations. *Dabiq*, ISIS’ online magazine, circulated an article titled, “The Revival of Slavery” that ordains militia members to “embrace the practice of sexual slavery and trafficking as a means to eradicate ‘pagan’ Yazidi women and girls from the Muslim world.”²³⁷ ISIS also published a “frequently asked questions” pamphlet for militia members explaining that all non-Muslim women are “spoils of war.”²³⁸ The pamphlet detailed the administrative policies on ownership, including rules on punishments, sales, inheritance and gifting those enslaved.²³⁹

²³² ISIS made some exceptions for women medical professionals, such as doctors and nurses primarily when it faced a critical need for medical assistance as well as for teachers and some civil service administrators. LOUISA TARRAS-WAHLBERG, PROMISE OF PARADISE? A STUDY OF OFFICIAL ISIS-PROPAGANDA TARGETING WOMEN 36

(2016); WOMEN OF THE ISLAMIC STATE, *supra* note 20, at 7; U.N. HIGH COMM’R & UNAMI, REPORT ON THE PROTECTION OF CIVILIANS IN ARMED CONFLICT IN IRAQ: 11 SEPTEMBER-10 DECEMBER 2014 12-14 (2015), https://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_Sep_Dec_2014.pdf.

²³³ HRGJ CLINIC OF CUNY SCH. OF L. ET AL., *supra* note 20, ¶ 52.

²³⁴ *Id.* One woman assaulted with the instrument for forgetting to wear gloves described it as “more painful than labor pains.” Patrick Cockburn, *ISIS in Mosul: Brutal Metal Instrument Used to Clip Women’s Flesh Shows Increasing Barbarity Within ‘Caliphate’s’ Own Walls*, THE INDEPENDENT (Feb. 24, 2015), <https://www.independent.co.uk/news/world/middle-east/isis-mosul-iraq-caliphate-brutal-metal-instrument-used-clip-women-s-flesh-a6893876.html>

²³⁵ Davis, *Reimagining Justice*, *supra* note 28, at 525-27.

²³⁶ HRGJ CLINIC OF CUNY SCH. OF L. ET AL., *supra* note 20, ¶ 52.

²³⁷ See HRGJ CLINIC OF CUNY SCH. OF L. ET AL., SEEKING ACCOUNTABILITY AND DEMANDING CHANGE: A REPORT ON WOMEN’S HUMAN RIGHTS VIOLATIONS IN IRAQ UNDER THE U.N. CONVENTION AGAINST TORTURE, EUROPEAN COUNTY OF ORIGIN INFORMATION NETWORK, 13-14 (2015).

²³⁸ HRGJ CLINIC OF CUNY SCH. OF L. ET AL., *supra* note 20, ¶ 46.

²³⁹ U.N. Hum. Rts Council, “*They Came to Destroy*,” *supra* note 219, ¶¶ 55-58, 62 & 75. Note that Muslim, Christian and Turkmen women have also been forced to marry fighters, raped and sexually enslaved. HRGJ CLINIC OF CUNY SCH. OF L. ET AL., *supra* note 20, ¶ 74.

A gender discrimination lens applied to the crime of enslavement unearths myriad gender-based crimes that are not found within the traditional scope of sexual slavery indictments. While the crime of sexual slavery under the Rome Statute recognizes the act of rape, it also has the unintended effect of narrowing the scope of accountability for gender-based violence experienced by enslaved persons.²⁴⁰ The gendered experience of enslavement and the violence that enslaved women and girls²⁴¹ face reaches beyond specific acts of sexual assault. In addition to suffering routine rape by their owners, women and girls enslaved by ISIS were forced to strip naked at auctions,²⁴² endure the trauma of being sold and re-sold, take drugs to hasten physical maturation²⁴³ and perform a range of humiliating acts for their owners, among other abuses.²⁴⁴ These gender-based crimes, that can amount to gender persecution, run the risk of going unrecognized and unaccounted for in justice mechanisms.²⁴⁵

Inadequate charges that do not capture the full range of gender abuses endured in slavery could also lead to impunity for a range of perpetrators involved in slave trade²⁴⁶—a crime recognized under customary international law but not included in the Rome Statute. Those engaged in slave trade practices including slave market organizers, slave registration administrators, architects of enslavement systems, as well as those who may “gift” persons enslaved, to name a few, also run the risk of escaping

²⁴⁰ Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *Sexual Slavery and Customary International Law*, in PROSECUTING THE PRESIDENT: THE TRIAL OF HISSÈNE HABRÉ (Sharon Weill et al. eds., Oxford Univ. Press, 2020). “While enumeration of sexual slavery as a separate crime does emphasize its visibility and initiates momentum toward its eradication, this more contemporary legal separation may hinder a fuller comprehension of slavery in all of its dimensions.” *Id.* at 15.

²⁴¹ At the time of this writing, there were no documented cases known to the author about LGBTIQ, non-binary and gender non-conforming persons enslaved by ISIS, which is not to say such acts did not take place.

²⁴² E.g., Adam Withnall, *ISIS Sex Slaves ‘Sold at Market for as Little as a Pack of Cigarettes’ as Life under Jihadis is Exposed*, INDEPENDENT (June 9, 2015), <https://www.independent.co.uk/news/world/middle-east/isis-sex-slaves-sold-at-market-for-as-little-as-a-pack-of-cigarettes-as-life-under-jihadis-is-10306639.html>; Nadia Murad, *I Was an ISIS Sex slave. I Tell My Story Because it Is the Best Weapon I Have*, THE GUARDIAN (Oct. 6, 2018), <https://www.theguardian.com/commentisfree/2018/oct/06/nadia-murad-isis-sex-slave-nobel-peace-prize>.

²⁴³ Fred Strasser, *ISIS Makes Sex Slavery Key Tactic of Terrorism Action against Violent Extremism Must Address Abuse of Women*, UN Official Says, U.S. INST. OF PEACE (Oct. 6, 2016), <https://www.usip.org/publications/2016/10/isis-makes-sex-slavery-key-tactic-terrorism>.

²⁴⁴ Géraldine Boezio, *Escaping from ISIL, a Yazidi Sexual Violence Survivor Rebuilds Her Life*, U.N. (Jul. 10, 2018), <https://www.un.org/sexualviolenceinconflict/escaping-from-isil-a-yazidi-sexual-violence-survivor-rebuilds-her-life>.

²⁴⁵ Justice mechanisms may include sexual slavery charges but may not include accountability for enslavement, which is inclusive of, but also reaches beyond, sexual slavery.

²⁴⁶ See generally Patricia Sellers & Jocelyn Getgen Kestenbaum, *Missing in Action: The International Crime of the Slave Trade*, 18 INT’L J. OF CRIM. JUST. (2020) (examining the slave trade practice and its prohibition under international law).

accountability in justice mechanisms.²⁴⁷ Survivors' holistic experiences may also be left out of historical records.

ISIS' gender prescriptions also regulate men and boys' gender expression. Through the promotion of a militarized form of masculinity, ISIS fighters dictated clear lines for acceptable masculine presentations and behaviors.²⁴⁸ "True" men and "true" masculinity depended on women's submission, because "[i]f women were real women then men would be real men."²⁴⁹ One key display of masculinity under ISIS is the ability to grow a full-bodied beard. After the takeover of Mosul, militia members distributed leaflets that forbade men from shaving their beards because "no one does this except men who are effeminate."²⁵⁰ Men were also forbidden from wearing western-style clothing²⁵¹ or having stylish haircuts.²⁵² Pant lengths were required to fully cover men's legs.²⁵³

This construction of masculinity undergirds ISIS' violent opposition to same-sex intimacy. Numerous medieval-style executions by ISIS of people accused of homosexual behavior have been documented, including stonings, immolations, and beheadings.²⁵⁴ ISIS also subjected victims to death by firing squad and pushed others off of tall buildings to fall to their deaths.²⁵⁵ Sometimes victims were raped prior to their executions.²⁵⁶ ISIS systematically reviewed old records at schools and police stations, searching

²⁴⁷ See Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *The International Crimes of Slavery and the Slave Trade: A Feminist Critique*, in GENDER AND INTERNATIONAL CRIMINAL LAW, 27-28, (Valerie Oosterveld, et al. eds, forthcoming Oxford Univ. Press, 2021) (arguing that it is necessary to have a more holistic examination of the gender-sexual conduct under enslavement).

²⁴⁸ Ariel I. Ahram, *Sexual Violence and the Making of ISIS*, 57 GLOBAL POLITICS AND STRATEGY 57, 58-66 (May 19, 2015).

²⁴⁹ Dyan Mazurana et al., *Gender Under a Black Flag: ISIL Recruitment*, REINVENTING PEACE (Aug. 19, 2015), <https://sites.tufts.edu/reinventingpeace/2015/08/19/gender-under-a-black-flag-isil-recruitment>. See also WOMEN OF THE ISLAMIC STATE, *supra* note 20.

²⁵⁰ Davis, *Reimagining Justice*, *supra* note 28, at 528-29.

²⁵¹ *Id.* at 515.

²⁵² *Id.* at 529.

²⁵³ LUISA DIETRICH & SIMONE E. CARTER, GENDER AND CONFLICT ANALYSIS IN ISIS AFFECTED COMMUNITIES OF IRAQ, 21 (Oxfam, May 2017).

²⁵⁴ E.g., *Timeline of Publicized Executions for Alleged Sodomy by the Islamic State Militias*, OUTRIGHT ACTION INT'L, (June 30, 2016), <https://www.outrightinternational.org/content/timeline-publicized-executions-alleged-sodomy-islamic-state-militias>.

²⁵⁵ HRGJ CLINIC OF CUNY SCH. OF L. ET AL., *supra* note 20, ¶¶ 60, 67.

²⁵⁶ *ISIS Throws Iraqi Teenager off a Building for Being Gay*, ARA NEWS (Jan. 12, 2017), <http://aranews.net/2017/01/isis-throws-iraqi-teenager-off-roof-for-being-gay>; *In Islamic State Held Areas Being Gay Often Means a Death Sentence*, LA TIMES (June 13, 2016), <http://www.latimes.com/world/middleeast/la-fg-islamic-state-anti-gay-violence-20160613-snap-story.html>; Michael K. Lavers, *Report: Islamic State Executes Teenager for "Homosexuality"*, WASHINGTON BLADE (Jan. 3, 2016), <http://www.washingtonblade.com/2016/01/03/report-islamic-state-executes-teenager-for-homosexuality>.

for gender transgressors. In one incident, after finding a suspension record of two women caught kissing at Mosul University, ISIS immediately issued their death warrants.²⁵⁷

ISIS' gender narratives also reflect a conflation of socially-constructed attributes assigned to heterosexual and homosexual behaviors. The mere absence of certain masculine presentations is sufficient to run the risk of being accused of homosexuality, regardless of true sexual orientation or gender identity. For example, young men wearing skinny jeans have been accused of homosexual behavior and punished through floggings or execution.²⁵⁸ UN experts have called out ISIS's ideology as "grounded on a systematic discrimination against persons on the basis of gender and gender expression, which has included torturing and killing those they deem not in conformity with their understanding of gender roles."²⁵⁹

Despite the overwhelming number of notorious gender abuses, as of the time of this writing, few ISIS members have been held accountable for gender-based crimes.²⁶⁰ In Iraq, fighters are prosecuted under counter-terrorism charges, largely based on evidence of their ties to the militia.²⁶¹ Iraqi civil society organizations have called for transparent and fair trials that account for gender-based crimes committed by the militia as well as their impacts on victims.²⁶² The UN Secretary-General echoed this recommendation in his 2018 annual report on conflict-related sexual violence.²⁶³

With the domestic justice system falling short, some Iraqi activists are organizing local reconciliation initiatives in an effort to raise visibility on

²⁵⁷ HRGJ CLINIC OF CUNY SCH. OF L. ET AL., *supra* note 20, ¶ 61. The two women were able to escape Mosul with the help of local Iraqi activists. *Id.*

²⁵⁸ OHCHR & UNAMI, *Report on the Protection of Civilians in the Armed Conflict in Iraq: 1 May – 31 October 2015*, 19 (Jan. 19, 2016).

²⁵⁹ U.N. Hum. Rts Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Gender-Sensitive Approach to Arbitrary Killings*, ¶ 47, U.N. Doc. A/HRC/35/23 (June 6, 2017).

²⁶⁰ *See, e.g.*, U.N. Secretary-General, *Conflict-Related Sexual Violence*, ¶ 25, U.N. Doc. S/2019/280 (Mar. 29, 2019) (noting that "despite thousands of detentions and numerous prosecutions of members of . . . [ISIS] on terrorism charges, none of those cases have included indictments for sexual crimes" in Iraq).

²⁶¹ OHCHR & UNAMI, *Human Rights in the Administration of Justice in Iraq: Trials under the Anti-Terrorism Laws and Implications for Justice, Accountability and Social Cohesion in the Aftermath of ISIL*, 10 (Jan. 2020); *Open Letter to the UN Security Council on the Government of Iraq's Prosecutions of ISIS Fighters*, MADRE, (June 13, 2018), <https://www.madre.org/press-publications/human-rights-report/open-letter-un-security-council-government-iraqs-prosecutions>.

²⁶² *Open Letter*, *supra* note 261; International Federation for Human Rights (FIDH) & Kinyat Organization for Documentation, *Iraq Sexual and Gender-Based Crimes against the Yazidi Community: The Role of ISIL Foreign Fighters*, at 41-43 (Oct. 2018).

²⁶³ U.N. Secretary-General, *Report of the Secretary-General on Conflict-Related Sexual Violence*, ¶ 46, U.N. Doc. S/2018/250 (Apr. 16, 2018).

gender-based crimes and help survivors reintegrate with their communities. In 2017, advocates filed a communication calling on the ICC to open a preliminary examination of gender persecution committed by ISIS in Iraq.²⁶⁴ By 2019, the UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD) and the International, Impartial, and Independent Mechanism (IIIM) entered into agreements with MADRE to receive documentation of gender-based violence acts committed by ISIS fighters that may amount to gender persecution.²⁶⁵ Recognition of ISIS sexual and gender-based crimes, including those that amount to persecution, would help normalize the concept of gender equality and underscore the need to address long-standing gender-based violence and discrimination throughout all of Iraq. If redress for such crimes is not possible through traditional domestic or transitional justice processes, the international community should consider alternative forms of redress, such as restorative justice approaches and participation by survivors of gender-based crimes in reconstruction processes.

2. *Gender-based crimes in Colombia's conflict*

Decades of conflict coupled with historical racism, misogyny, homophobia and transphobia have worked to normalize violence against women, girls, LGBTIQ, nonbinary and gender non-conforming persons, especially for those who face multiple and intersecting forms of discrimination in Colombia.²⁶⁶ Afro-descendant women and girls experience oppressive gender and racial narratives that emerged in countries shaped by colonialism and slavery in order to justify violence. Historically, the brutal treatment of enslaved Black women, who faced torture including rape, sadistic flogging, and constant nakedness of their bodies at auctions and at publicly held punishments was justified by a gendered-racialized ideology.²⁶⁷ Racial narratives depicted Black people as “animals” or “savages” needing

²⁶⁴ HRGJ CLINIC OF CUNY SCH. OF L. ET AL., *supra* note 20; Lisa Davis, *Prosecuting ISIS Crimes Against Women and LGBTIQ People Would Set a Crucial Precedent*, OPENDEMOCRACY, (Feb. 1, 2018), <https://www.opendemocracy.net/en/5050/activists-seek-prosecution-isis-crimes-women-lgbtqi-persons>.

²⁶⁵ *Seeking Justice for ISIS Rights Abuses*, MADRE (Jan. 28, 2020), <https://www.madre.org/press-publications/article/seeking-justice-isis-rights-abuses-next-phase>.

²⁶⁶ See, e.g., Radhika Coomaraswamy (Special Rapporteur on Violence against Women), *Integration of the Human Rights of Women and the Gender Perspective*, U.N. Doc. E/CN.4/2002/83/Add.3, ¶ 28 (Mar. 11, 2002) (noting how Afro-Colombian and Indigenous women experience multiple and intersecting forms of discrimination including on gender, race, and ethnicity); William J. Payne, *Death-squads Contemplating Queers as Citizens: What Colombian Paramilitaries Are Saying*, 23 GENDER, PLACE & CULTURE 328, 339 (2016) (noting how armed actors in Colombia “demonstrate a construction of the nation rooted in hypermasculinity and in the exclusion of some from full citizenship based on sexuality and gender”).

²⁶⁷ See BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 25-27 (Pluto Press 1982) (providing an in-depth discussion on sexism and the black female enslavement experience).

to be enslaved. The sexual enslavement of Black women and girls was compounded by the belief that Black women are innately lustful and sexually deviant, which in turn, justified the brutal sexual violence committed against them.²⁶⁸ Narratives that derive from historical slavery persist today, reinforcing structural oppression²⁶⁹ and justifying the use of sexual and other forms of gender-based violence against Afro-Colombian women and girls.²⁷⁰

All of Colombia's armed actors—paramilitaries, guerrilla groups and government forces—have inflicted gender-based crimes that may amount to persecution.²⁷¹ About four-fifths of conflict victims in that country are women and girls²⁷² with the conflict taking place predominantly on Afro-Colombian and Indigenous lands.²⁷³ Sexual violence and other forms of gender-based violence were routinely used by armed actors as punishments inflicted against those who deviate from patriarchal norms aggravated by their perpetrators. Labeled as “bad girls” or “bad queers,”²⁷⁴ women, girls, LGBTIQ, nonbinary and other gender non-conformers have been subjected to humiliation, forced labor, and enslavement.²⁷⁵ “Good girls” were considered those who followed established norms on dress and behaviors set by fighters.²⁷⁶ Paramilitary and guerrilla groups also controlled women and girls' reproductive rights and behaviors, through forced abortions, forced pregnancies, forced contraception, and sexual slavery.²⁷⁷ LGBTIQ persons

²⁶⁸ See *id.* at 25-34. Hooks notes how Angela Davis has pointed out that the rape of Black women who were enslaved was not only motivated by lust, but was also part of an “institutionalized method of terrorism” used to demoralize and dehumanize Black women and girls. *Id.* at 27.

²⁶⁹ See, e.g., Deborah Zalesne, *Making Rights a Reality: Access to Health Care for Afro-Colombian Survivors of Conflict-Related Sexual Violence*, 51 COLUM. HUM. RTS. L. REV. 670 (2020) (discussing the structural barriers Afro-Colombian women face in the realization of the right to health and health care); J.M. Kirby & René Uruña, *Understanding Threats Against Afro-Descendant Women Human Rights Defenders: Re-Envisioning Security*, 4 COLUM. HUM. RTS. L. REV. ONLINE 324 (Nov. 20, 2020) (discussing the Colombian government's misdiagnosis and inadequate response to threats against Colombian women human rights defenders).

²⁷⁰ Julie Goldscheid, *Gender Violence Against Afro-Colombian Women: Making the Promise of International Human Rights Law Real*, 4 COLUM. HUM. RTS. L. REV. ONLINE 249, 258 (2020) (discussing how discriminatory narratives weave a story based on racial and gender portraying Black women as “hypersexual” or as “witches,” which incites sexual violence during conflict and its impunity in the aftermath).

²⁷¹ Virginia Bouvier, *Gender and the Role of Women in Colombia's Peace Process* 9 (U.N. Women, 2016) (noting while documentation efforts have focused on female victims, there has been increased recognition of male victims of sexual violence in Colombia's conflict).

²⁷² *Id.* at 9.

²⁷³ Rebecca Bratspies, *‘Territory Is Everything’: Afro-Colombian Communities, Human Rights and Illegal Land Grabs*, 4 COLUM. HUM. RTS. L. REV. ONLINE 290, 304 (2020).

²⁷⁴ Payne, *supra* note 266, at 339.

²⁷⁵ Bouvier, *supra* note 271, at 10-11.

²⁷⁶ *Id.*

²⁷⁷ Olimpo de Jesus Sánchez Caro, and Others (Forced Abortions), WOMEN'S LINK WORLDWIDE <https://www.womenslinkworldwide.org/en/gender-justice-observatory/court-rulings->

have been subjected to organized campaigns of rape and executions.²⁷⁸ Men and boys who exhibited what paramilitaries believed to be “undesirable behaviors” associated with masculinity were punished with torture or murder.²⁷⁹

In 2005, after visiting Colombia, the Inter-American Rapporteur on the Rights of Women for the Inter-American Commission on Human Rights observed that perpetrators exerted their control over community members, particularly women, in order to increase their power.²⁸⁰ Armed actors regularly monitored dress and behaviors of those under their control, including by regulating jewelry, hairstyles, and clothing length.²⁸¹ Women were forbidden from wearing clothes that exposed their bodies and sometimes were ordered to wear specific garments.²⁸² In an effort to show their ability to keep public order, paramilitary groups would engage in what they called “corrective rape” and “social cleansing,” i.e., the raping or killing of people considered “undesirable” such as criminals, sex workers,²⁸³ and LGBTIQ persons.²⁸⁴ This manipulation of gender narratives also worked to make communities complicit in the violence they endured. When sexual violence was used against women and girls as punishment for gender transgressions, it was often accepted by community members, with some viewing victims as “deserving” such punishments for breaking gender rules.²⁸⁵ In one incident reported by UN Women, a paramilitary commander forced sixteen gay youths to fight each other in a boxing ring.²⁸⁶ Unsupported by their community, many of them were forced to leave town.²⁸⁷ In other

database/postulado-olimpode-jesus-sanchez-carro-and-others (Dec. 16, 2016) (discussing the Justice and Peace case against Olimpo de Jesus Sanchez Caro and others); Christine Chinkin & Keina Yoshida, *Colombia's Recent Ruling on Reproductive Violence and Forced Recruitment Is a Significant Step for Ex-combatant Women and Girls*, LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE (Feb. 19, 2020), <https://blogs.lse.ac.uk/latamcaribbean/2020/02/19/colombias-recent-ruling-on-reproductive-violence-and-forced-recruitment-is-a-significant-step-for-ex-combatant-women-and-girls> (discussing the Constitutional Court's decision on the case of Helena). Both cases pertain to forced contraception and forced abortions. AMNESTY INT'L, ‘THIS IS WHAT WE DEMAND, JUSTICE!’ IMPUNITY FOR SEXUAL VIOLENCE AGAINST WOMEN IN COLOMBIA’S ARMED CONFLICT 15 (2011).

²⁷⁸ Bouvier, *supra* note 271, at 14; Daniela Kravetz, *Promoting Domestic Accountability for Conflict-Related Sexual Violence: The Cases of Guatemala, Peru, and Colombia*, 32 AM. U. INT'L L. REV. 707, 723-25 (2017).

²⁷⁹ Bouvier, *supra* note 271, at 10-11. Such behaviors included “stealing, hunting prohibited animals, or carrying sexually-transmitted diseases.” *Id.* at 10.

²⁸⁰ IACHR, *supra* note 223, ¶¶ 95-96.

²⁸¹ *Id.* ¶¶ 95-99.

²⁸² *Id.* ¶¶ 98-99.

²⁸³ *Id.* ¶ 97.

²⁸⁴ Bouvier, *supra* note 271, at 14. Ramiro Vanoy Murillo case, *supra* note 222, at 1331-1333.

²⁸⁵ IACHR, *supra* note 223, ¶¶ 95-96.

²⁸⁶ Bouvier, *supra* note 271, at 14.

²⁸⁷ *Id.*

instances reported by Colombia Diversa, LGBTIQ persons were subjected to forced labor in an effort to “correct” their sexual orientation and/or gender expression.²⁸⁸ Cisgender and transgender women were forced into servitude to perform domestic labor such as cooking, washing clothes or treating the sick based on the assignment of these activities to women’s gender roles.²⁸⁹

The recruitment of local actors helped to promote an oppressive anti-gender rights ideology under the assumption that militia members were supposedly bringing law and order back to communities lacking adequate infrastructure support.²⁹⁰ Paramilitaries have been described as “authors of extreme homophobic violence,” couched as a response to the economic devastation created by the conflict.²⁹¹ On a closer look in Colombia, armed actors did not commit sexual and gender-based violence solely or primarily because of socio-economic problems. Instead, these two drivers of conflict, socio-economic instability and anti-gender rights ideology, ran parallel to each other, as Castillo-Diaz and Valji argue.²⁹²

The United Self-Defense Forces of Colombia²⁹³ divided up cisgender women, LGBTIQ, nonbinary and gender non-conforming individuals into two categories: “those who maintained a low profile and those who were ‘depraved.’”²⁹⁴ Those who placed in the latter category faced forced displacement and execution. One member of the Forces advocated for the firebombing of gay establishments.²⁹⁵ Pregnancies were prohibited from being carried to term because they were believed to interfere with women’s duties of providing sexual services to male militia members.²⁹⁶ One paramilitary woman was brutally tortured and killed after refusing to have an abortion.²⁹⁷ She was publicly gutted with a chainsaw in order to terrorize other female members of the armed group into submission.²⁹⁸

²⁸⁸ COLOM. DIVERSA, ¿QUIÉN NOS VA A CONTAR? 86-88 (Sept. 2020).

²⁸⁹ *Id.*

²⁹⁰ Payne, *supra* note 266, at 337. While there has been a general perception that these practices of social control were mainly used by paramilitary groups, more recently there has been increasing awareness on how the FARC and other armed actors used similar methods to control the population in their areas of control, and used misogynist, racist and homophobic violence. COLOM. DIVERSA, *supra* note 288, at 76-94.

²⁹¹ Payne, *supra* note 266, at 337.

²⁹² Díaz & Valji, *supra* note 152; see discussion *supra* section III.

²⁹³ Autodefensas Unidas de Colombia (AUC), *The United Self-Defense Forces of Colombia*, STANFORD, <https://cisac.fsi.stanford.edu/mappingmilitants/profiles/united-self-defense-forces-colombia>.

²⁹⁴ Payne, *supra* note 266, at 337.

²⁹⁵ *Id.* at 338.

²⁹⁶ *Id.* at 336.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

In another instance, when two men were caught having sex, the man who had been penetrated was raped, tortured and killed by armed actors.²⁹⁹ At play was the invocation of the “indignity” of “behaving” as both a woman and as a homosexual by engaging in homosexual intercourse and a “passive” sexual role.³⁰⁰ This demonstrates the correlation between the gender oppression of women and LGBTIQ persons in a context marked by misogyny and homophobia.³⁰¹ The underlying gender discrimination in the rape, torture, and murder of the man re-enforces pre-existing gender narratives adopted and exacerbated by armed actors’ anti-gender rights ideology. Such ideology is imposed on women and LGBTIQ, nonbinary and gender non-conforming persons and enforced with egregious punishments when transgressed.

Just as pre-existing discriminatory narratives against women and LGBTIQ persons reinforce the use and justification of gender-based crimes that may amount to persecution, so does underlying discrimination based on race, ethnicity and other grounds. The *Mesa de Trabajo Mujer y Conflicto Armado* notes that the “racism that prevails in Colombian society is also present in the way the armed actors reproduce, in their relations with Afro-Colombian women, exclusionary and discriminatory practices that ignore their differences.”³⁰² Gender prescriptions and punishments driven by armed actors derive from discrimination embedded in pre-conflict societal practices, as do armed actors’ oppressive racial and ethnic narratives. Accordingly, Afro-Colombian and Indigenous women have been found twice as vulnerable to abuse by armed groups due to their historical experience of multiple and intersecting forms of discrimination.³⁰³ These cases continue to occur in the post-conflict period, evidencing deeply entrenched discrimination by armed actors against these communities.³⁰⁴

Discrimination based on gender, race and ethnicity is not new. Recognition of multiple forms of oppression was one of the most remarkable

²⁹⁹ *Id.* at 336-37.

³⁰⁰ See discussion *supra* section I.

³⁰¹ Payne, *supra* note 266, at 336-37.

³⁰² IACHR, *Violence and Discrimination Against Women in the Armed Conflict in Colombia: IV. Multiple Discrimination Against Afro-Colombian Women and Indigenous Women*, ¶ 109 OEA/Ser.L/V/II, doc. 67 (Oct. 18, 2006) (citing Mesa de Trabajo de Mujer y Conflicto Armado, IMPACT OF THE ARMED CONFLICT ON AFRO-COLOMBIAN WOMEN, 27 (Feb. 2003)).

³⁰³ IACHR, *supra* note 223, ¶ 102.

³⁰⁴ U.N. Secretary-General, *Conflict-related Sexual Violence*, ¶¶ 24-25, U.N. Doc. S/2021/312 (Mar. 30, 2021). This has been particularly the case with the Colombian army and still persists to this day. *E.g.*, Inter-Am. Comm’n. Hum. Rts., *IACHR condemns the kidnapping and collective rape of a 12-year-old indigenous girl and the lack of adequate investigation in Colombia*, June 29, 2020, <http://www.oas.org/es/cidh/prensa/comunicados/2020/153.asp> (last visited Apr. 18, 2021); Conversation with Daniela Kravetz, Apr. 11, 2021 (notes on file with Author).

achievements of the Colombian Peace process, and a hard-fought accomplishment by civil society organizations. The 2016 Peace Accord between the Colombian government and the Revolutionary Armed Forces of Colombia (FARC) stands out internationally for its recognition of Afro-descendant and Indigenous collective rights and its emphasis on gender justice and women's participation.³⁰⁵ This initial Peace Accord is historic in its inclusion of an intersectional lens. It recognizes women, LGBTIQ persons, Afro-Colombians and Indigenous people as victims in the conflict, acknowledges discriminatory violence based on race, ethnicity and gender, specifically naming sexual orientation and gender identity, and takes a survivor-centered approach to peace.³⁰⁶

The Special Jurisdiction for Peace ("JEP"), charged with holding perpetrators of conflict-related crimes accountable, has opened seven "macro" cases to date that focus on national themes or regional territories. Two out of the three regional cases, 002 and 004, cover violations of human rights in departments where large Afro-Colombian populations reside.³⁰⁷ The four thematic cases address crimes committed nationally and include kidnapping, the recruitment and use of child soldiers by the FARC, the victimization of Patriotic Union members, and extrajudicial killings of civilians falsely made to look like guerrillas.³⁰⁸

Several Colombian organizations have advocated for the JEP to open a thematic case on sexual violence.³⁰⁹ A coalition of five prominent legal and feminist Colombian organizations released a report citing the long-standing institutional discrimination embedded within Colombia's justice system and calling for the JEP to take a more meaningful approach to addressing sexual

³⁰⁵ See Lisa Davis, *Third Party at the Table: Afro-Colombian Women's Struggle for Peace and Inclusion*, 4 COLUM. HUM. RTS. L. REV. ONLINE 363 (2020) (discussing the challenges to the implementation of one of the most historic peace accords known for recognizing racial and gender-based crimes).

³⁰⁶ See *id.* (discussing how the initial Peace Accord draft narrowly failed in a national referendum and how Colombia arrived at a new Accord stripped of its historical language). It should be noted that Afro-Colombians are often referred to as an ethnic group in direct translation of formal documents governing the Colombia conflict. *E.g.*, Peace Accords Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, Nov. 24, 2016, <http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf>.

³⁰⁷ Jurisdicción Especial Para La Paz, Sala de Reconocimiento de Verdad, De Responsabilidad y de Determinación de los Hechos y Conductas Auto No.002, Bogotá D.C., 04 de julio de 2018; Jurisdicción Especial Para La Paz, Auto SRVR 004 de 2018, Comisión Colombiana de Juristas (Jul. 18, 2018), https://www.coljuristas.org/observatorio_jep/documentos/documento.php?id=28.

³⁰⁸ Hum. Rts Watch, *Colombia, Events of 2019*, WORLD REPORT 2020 (2020), <https://www.hrw.org/world-report/2020/country-chapters/colombia#49dda6>.

³⁰⁹ *Id.*; *Hacia La Implementación Del Enfoque de Género en el Acuerdo Final de Paz de Colombia: Avances, Oportunidades y Retros*, Kroc Institute 39 (2020).

violence.³¹⁰ Among their recommendations, the coalition advocates for a deeper understanding of sexual and gender-based violence committed on the basis of discriminatory beliefs or attitudes against LGBTIQ persons.³¹¹ Advocates also note the need to take into account sexual violence committed against other recognized victims of the conflict, including when it was committed on the basis of age, ethno-racial identity or disability status.³¹²

Colombia's Constitutional Court has also called attention to sexual violence committed during the conflict as a form of gender discrimination, and has pressed authorities to address these crimes.³¹³ The transitional justice framework set up to prosecute demobilized paramilitaries and guerilla leaders under Law 975 of 2005 (the Justice and Peace Law) has responded by prosecuting a number of sexual violence cases.³¹⁴ Cases tried under the Justice and Peace Law primarily focus on establishing the patterns of macro-criminality (*patrones de macrocriminalidad*). Consequently, not all gender-based violence acts are included as specific charges. In an effort to capture the impact of these crimes, several judgments include a lengthy narrative on the pattern of gender-based violence, analyzing the various forms of gendered acts committed in the region where an armed group operated. For example, the 2015 decision in the Ramiro Vanoy Murillo case—concerning a paramilitary commander of the *Bloque Mineros*—contains a narrative section called “LGTBI population,” which provides concrete examples of

³¹⁰ See ALIANZA CINCO CLAVES, THE CONNECTION BETWEEN SEXUAL VIOLENCE AND THE ARMED CONFLICT: A CALL TO PREVENT SETBACKS IN THE SPECIAL JURISDICTION FOR PEACE (Dec. 2019).

³¹¹ *Id.* at 81. (identifying some of the problems arising from the absence of a gender approach to factual determinations for case 001).

³¹² *Id.* A coalition of Afro-Colombian organizations in collaboration with MADRE and CUNY Law School, have called attention to the need for the JEP to consider either opening a thematic case on persecution or including persecution analyses in territorial judgments. See Lisa Davis, *Introduction: Afro-Colombian Voices in the Colombian Peace Process*, 4.2 COLUM. HUM. RTS. LAW REV. ONLINE 247 (2020) (discussing the working relationship between the HRGJ Clinic and PCN, a coalition of Afro-Colombian human rights organizations). See also *La alianza Cinco Claves le Pide a la Jurisdicción Especial para la Paz Incorporar una Perspectiva de Género en sus Decisiones* [The Five Keys Alliance Asks the Special Jurisdiction for Peace to Incorporate a Gender Perspective in Its Decisions], WOMEN'S LINK WORLDWIDE, <https://www.womenslinkworldwide.org/informate/sala-de-prensa/la-alianza-cinco-claves-le-pide-a-la-jurisdiccion-especial-para-la-paz-incorporar-una-perspectiva-de-genero-en-sus-decisiones-1> (identifying some of the problems arising from the absence of a gender approach to determinations for case 001).

³¹³ Daniela Kravetz, *supra* note 278, at 722-29. See Babe Howell & Naree Sinthusek, *In the Crosshairs: Centering Local Responses to SGBV in Afro-Colombian Communities*, 4 COLUM. HUM. RTS. L. REV. 268 (2020) (discussing the need to ensure access to justice for victims of gender-based violence by supporting Afro-Colombian women's groups).

³¹⁴ Some decisions also contain an extensive analysis on gender-based violence, beyond sexual violence. See Daniela Kravetz, *supra* note 278, at 725 n.69 (noting various decisions of the transitional justice system that discuss the prevalence of violence against persons on the basis of their sexual orientation).

violence and discrimination on the basis of sexual orientation and gender identity.³¹⁵ While these specific acts are not reflected in the charges as acts of gender-based persecution, the tribunal relies on this evidence, among other evidence, to conclude that a pattern of gender-based violence was established.³¹⁶

At the time of this writing, cases moving through Colombia's transitional justice system pertaining to crimes committed against LGBTIQ persons have primarily focused on paramilitary groups under the Justice and Peace Law. However, on April 14, 2021 the JEP set new precedent when it confirmed charges of gender persecution as a crime against humanity when committed against five LGBTIQ persons in the armed conflict.³¹⁷ By doing so, the JEP, Colombia's main judicial mechanism aimed at seeking justice for crimes committed in the conflict, has for the first time recognized gender-based persecution as a crime against humanity – an historic precedent for gender justice in Colombia with global implications. Hopefully, the JEP will continue this momentum in its investigation to capture a more holistic picture of the role of different armed actors, including the FARC and the armed forces, in perpetuating different forms of gender-based violence, including against LGBTIQ persons, in their areas of control. While the JEP may rely on the Rome Statute, the defense could challenge charges that are solely based on the Statute, and not grounded in domestic criminal law. Instead, the JEP could follow the example of the Justice and Peace chambers and describe patterns of gender, ethnic and racial persecution, especially where crimes reflect multiple forms of discrimination, including against Afro-Colombian and Indigenous women, as defined under the Rome Statute in its narrative analyses on crimes.

Case law from international tribunals has demonstrated that perpetrators may have multiple reasons for committing sexual and gender-based crimes during conflict. When defendants of rape allegations claim such violent acts were opportunistic and not conflict-related, prosecutors should examine whether there were discriminatory reasons behind such crimes, which are always conflict-related. For example, the Yugoslavia and Rwanda tribunals instructed prosecutors not to dismiss the underlying racist or misogynist beliefs that also motivated perpetrators to commit such acts in response to the defense argument that such crimes were merely

³¹⁵ Tribunal Superior de Medellín [T. Sup.] [Superior Tribunal of Medellín], Sala de Just. y Paz febrero 2, 2015, Sentencia 110016000253200680018 (p. 1331-33) (Colom.).

³¹⁶ *Id.* at 2510.

³¹⁷ Susann Aboueldahab, *Gender-Based Persecution as a Crime Against Humanity: A Milestone for LGBTI Rights before the Colombian Special Jurisdiction for Peace*, EJIL:TALK (May 4, 2021), <https://www.ejiltalk.org/gender-based-persecution-as-a-crime-against-humanity-a-milestone-for-lgbti-rights-before-the-colombian-special-jurisdiction-for-peace>.

opportunistic. The tribunals make clear that personal motivations to commit sexual violence as a form of torture, do not void the intent to discriminate.³¹⁸

Discriminatory motives that perpetuate gender-based violence also intertwine with other discriminatory motives including race and ethnicity. Racist and misogynist gender constructs around the world crystalized in the practice of slavery and helped to institutionalize the practice of rape, sexual slavery, sexual exploitation and forced prostitution committed against Afro-descendent enslaved people. Derived from fundamentalist religious teachings, Black and Indigenous women and girls were seen as created for men but innately flawed. These extreme misogynistic and racist constructs not only justified slavery, they also amplified the norms needed to justify the oppression of minority women based on gender: if they defied their prescribed gender roles of subordination they would be severely punished and often killed. Even after the abolition of slavery, gendered racialized constructs of Black and Indigenous women continue to persist.

At the heart of race and gender-based violence is the justification of this violence as a form of punishment for Afro-Colombian and Indigenous women and girls who deviate from societies' prevailing gender roles, behaviors, activities and attributes. Consequently, the invisibility of the racial and gendered aspects of these crimes reinforces the idea that prescribing oppressive roles is acceptable. History teaches that if transitional justice mechanisms do not recognize and hold perpetrators of gender violence, including when it occurs at the intersection of race and ethnicity or other characteristics, such discrimination and violence continues to persist after conflict is over. This is because such crimes during conflict also mirror and reinforce the acceptance of violence used to reinforce racist and sexist beliefs in times of peace.

Including judicial analyses on persecution, or including intersectional gender, racial and ethnic persecution in territorial jurisprudence narratives, would be a groundbreaking achievement and serve as a model to transitional justice processes globally. It would help to unearth the multiple forms of discrimination that undergird violence against Black and Indigenous women and LGBTIQ persons. It would also broaden the scope of accountability for crimes committed against women and girls that include but also reach beyond sexual violence. Colombia's transitional justice system offers a historical record of the conflict through its proceedings. Jurisprudence should reflect the longstanding racism and misogyny that helped normalize conflict-related violence against LGBTIQ persons, and Afro-descendant and Indigenous women and girls that persists to this day.

³¹⁸ See *supra* Section I. Understanding Gender Persecution.

The recognition of gender, racial and ethnic persecution crimes would also provide a pathway to reconciliation for Afro-Colombian and Indigenous communities. It would usher in deeper contextual testimony on *why* crimes were committed. Under a holistic approach, judicial analyses on persecution would offer formal recognition that gender, racial and ethnic minorities and their communities endured, a first step in repairing harms. No other current charges in the JEP offer a more robust way to highlight the underlying discrimination that has fueled violence against Afro-Colombians, Indigenous persons, women and LGBTIQ persons for decades. Ultimately, the discrimination analysis that a macro-case on gender, racial and ethnic persecution demands, would start to chip away at a centuries-old racist-misogynist-homophobic ideology, that continues to fuel oppression in Colombia to this day.

3. *Ansar al-Dine and al-Qaeda in the Islamic Maghreb's gender-based crimes in Mali*

From amputations to executions, both women and men in Mali endured horrific abuses under the brutal regimes of Ansar al-Dine and al-Qaeda in the Islamic Maghreb.³¹⁹ AQIM's ideology targeted all people under their control in Timbuktu, regulating every aspect of their lives through gendered and religious policies.³²⁰ Militia members created a strict body of rules that regulated clothing, governed interactions between men and women and provided harsh penalties for transgressors.³²¹ While discussing how gender prescriptions were imposed on both women and men, the International Criminal Court notes the disparate effect of regulations and punishments imposed on women and girls, stating, "Ansar Dine / AQIM targeted women in Timbuktu and its region on sexist grounds, in the sense that they on the one hand, imposed disproportionate sanctions against women, and that they, on the other hand, imposed sanctions involving gender-specific violence."³²² For example, rape was used as a gender-specific sanction committed against women held in detention centers and forced into marriages.³²³

Similar to ISIS and Colombia's armed actors, authorities under Ansar al-Dine and AQIM, threatened, beat, flogged, and maimed women for the slightest dress code violations based on the militia's religious and gender ideology. Dress regulations for women included mandatory long skirts, head

³¹⁹ MALI CONFLICT, *supra* note 225, at 84-85.

³²⁰ Prosecutor v. Al Hassan, Case No. ICC-01/12-01/18, Pre-Trial Chamber Decision, ¶¶ 689-90 (Nov. 13, 2019).

³²¹ *Id.* ¶ 183.

³²² *Id.* ¶¶ 177, 697.

³²³ *Id.* ¶¶ 699-700.

scarves and veils, and prohibited the wearing of jewelry or perfume.³²⁴ Women reported being punished for small infractions such as wearing veils considered “too pretty” or “overly transparent.”³²⁵ A woman caught giving a man water to drink or not wearing gloves at the market when exchanging money for goods, could be met with imprisonment or corporal punishment.³²⁶ In one case, militia members cut off the ear of a woman for wearing a skirt deemed too short.³²⁷

For the first time in the Court’s history, the ICC Pre-Trial Chamber in the *Al Hassan* case has recognized these crimes, bringing charges of gender as well as religious persecution as crimes against humanity.³²⁸ Charges detail crimes including rape and other forms of sexual violence, torture and murder committed against civilians and, in particular women, on “sexist grounds.”³²⁹ Notably, the Court lists charges of gender persecution and sexual violence separately, indicating acts of sexual violence should not subsumed by persecution or torture charges and instead tried cumulatively.

When determining the threshold for torture the Court also seems to consider structural power dynamics between men and women. The “acute degree” of pain and suffering required to classify an act as torture may take into account “the age, sex, state of health or position of inferiority of the victim” as well as “the social, cultural and religious context relating to the victims.”³³⁰ In addition to the explicit mention of “sex” as a factor, the language on the “position of inferiority” and the “social, cultural and religious context” can be read as implicating gender discrimination, if particular socio-cultural beliefs cause women (or men) to be disproportionately subjected to deprivations of fundamental rights.

The Court also comments on the intersectionality between forms of gender and racial discrimination, noting how “violence against women could also have been motivated by considerations linked to skin color, since women with dark skin were more affected by this violence than others; the same goes for dark-skinned men who, according to some witnesses, were [more] persecuted than those with light skin.”³³¹ The intersectional grounds

³²⁴ MALI CONFLICT, *supra* note 225, at 148.

³²⁵ Prosecutor v. Al Hassan, Case No. ICC-01/12-01/18, ¶¶ 282, 698.

³²⁶ ICC, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the Opening of the Confirmation of Charges Hearing in the Case against Al Hassan* (July 8, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=180708-otp-statement-al-hassan>.

³²⁷ MALI CONFLICT, *supra* note 225, at 164.

³²⁸ Prosecutor v. Al Hassan, Case No. ICC-01/12-01/18.

³²⁹ *Id.* ¶ 707.

³³⁰ *Id.* ¶ 230.

³³¹ *Id.* ¶ 702. The intersection between race and gender persecution has been noted in other international cases, such as the targeting of darker skinned Fur and Masalit women for sexual violence in

of religion and gender persecution puts the Court in a strong position to show how multiple forms of discrimination interact together in the enactment of crimes and oppression. As the first international tribunal to adjudicate the crime of gender persecution, the world will look to the ICC's findings in the *Al Hassan* case for clarity on its scope and meaning. Such a determination would set a historical precedent and mark a positive advancement, not only for holding perpetrators of gender-based crimes accountable, but also for the discourse on gender persecution.

III. RECOGNIZING GENDER PERSECUTION SURVIVORS' RIGHTS TO PARTICIPATION

Sustainable peace requires survivors' participation, including survivors of gender-based crimes. As discussed in Section II, pre-existing gender inequalities which are reinforced by gender discrimination, are strong predictors of armed conflict.³³² As conflicts become more complex and fractured with the proliferation of non-state actors,³³³ conflict-related violence has also intensified, disproportionately impacting civilians, including along the lines of gender.³³⁴ Research not only shows peace agreements are more durable when women civil society members participate, but that their participation also increases the likelihood that remedies addressing pre-existing discriminatory social and cultural norms are included in agreement drafts.³³⁵

Unfortunately, the dual role women play in conflict as both peacemakers and survivors has also been a point of controversy. Far too often when women are treated as victims, they are thought of as people "needing protection" instead of as rights-holders who earn a seat at negotiations tables. The same stereotypes that bar women from participation also blind key conflict resolution actors to the broader community of gender-based violence survivors. Consequently, they too are left out of peace

Darfur. *E.g.*, John Hagan, Wenona Rymond-Richmond, & Alberto Palloni, *Racial Targeting of Sexual Violence in Darfur*, 99 AM. J. PUBLIC HEALTH 1386, 1386-92 (2009).

³³² *E.g.*, RADHIKA COOMARASWAMY, PREVENTING CONFLICT, TRANSFORMING JUSTICE, SECURING PEACE: A GLOBAL STUDY ON THE IMPLEMENTATION OF UNITED NATIONS SECURITY COUNCIL RESOLUTION 1325, 68 (2015); Jana Krause et al., *Women's Participation in Peace Negotiations and the Durability of Peace*, 44 INT'L INTERACTIONS, 990 (2018).

³³³ U.N. Secretary-General, *Women and Peace and Security*, ¶ 12, U.N. Doc. S/2019/800 (Oct. 9, 2019).

³³⁴ Jacqui True & Yolanda Riveros-Morales, *Towards Inclusive Peace: Analysing Gender-Sensitive Peace Agreements 2000–2016*, 24 (Nov. 27, 2018).

³³⁵ Georgetown Institute for Women, Peace and Security, *Women Leading Peace*, 27 (2015).

processes. When women have been included, it has largely been the result of advocacy efforts by local women's groups and their international allies.³³⁶

Despite these obstacles, the discourse on survivors' rights is starting to evolve. In recognition of survivors' key role in creating sustainable peace and their rights to participation in redress mechanisms, a survivor-centered approach is emerging as a significant part of the WPS agenda.³³⁷ It offers a pathway towards survivors' participation in peace and transitional justice mechanisms in a way that supports the recognition of gender and other forms of discrimination as root causes of conflict-related violence. As argued below, this survivor-centered approach opens path to participation for both women as well as LGBTIQ, non-binary and gender non-conforming persons.

A. Women's participation in peace processes

Despite growing evidence on the success of women's interventions and the framework laid out by the WPS agenda, women's presence in peace processes remains unjustifiably low.³³⁸ Women are often dismissed as unqualified and are saddled with assumptions that their participation may divert the agenda to "less pressing" issues.³³⁹ Structural barriers such as women's underrepresentation in the security and political spheres also make them less likely to be chosen as participants.³⁴⁰ These obstacles, coupled with pre-existing discriminatory narratives such as women being "too emotional," frequently lead to their exclusion.³⁴¹ Consequently, from 1992-2019 women only made up about 13 percent of negotiators, and 6 percent of mediators and signatories in formal peace processes globally.³⁴² When women have been part of peace processes, it is often only after local and international women's groups mobilize to exert pressure on negotiating parties.³⁴³ Even

³³⁶ THANIA PAFFENHOLZ ET AL., MAKING WOMEN COUNT - NOT JUST COUNTING WOMEN: ASSESSING WOMEN'S INCLUSION AND INFLUENCE IN PEACE NEGOTIATIONS 5, (The Graduate Inst. of Int'l and Dev. Studies and U.N. Women, 2016).

³³⁷ The United Nations adopted the Women, Peace and Security (WPS) Agenda under the passage of UN Security Council Resolution 1325 over twenty years ago. The WPS agenda recognizes women's participation as key to ending conflict and securing sustainable peace. See *UN Women, Timeline: 20 Years of Women, Peace and Security*, UN WOMEN, <https://interactive.unwomen.org/multimedia/timeline/womenpeacesecurity/2020/en/index.html> (providing a timeline of major moments, including both successes and setbacks to the implementation of the WPS Agenda).

³³⁸ U.N. Secretary-General, *supra* note 333, ¶ 12.

³³⁹ Georgetown Institute for Women, Peace & Security, *supra* note 335, at 25.

³⁴⁰ *Id.* at 24.

³⁴¹ E.g., Lisa Davis, *Who's Missing From Syria's Peace Talks?*, OPENDEMOCRACY (Jan. 29, 2016), <https://www.opendemocracy.net/en/5050/who-s-missing-from-syria-s-peace-talks>.

³⁴² *Women's Participation in Peace Processes*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/womens-participation-in-peace-processes> (last visited Dec. 10, 2020).

³⁴³ COOMARASWAMY, *supra* note 332, at 47.

so, after successfully obtaining a seat at the table and other formal discussions, women peacemakers often find themselves excluded from the real decision-making processes, which usually remain centered on a smaller group of male leaders.³⁴⁴

Perhaps the most compelling argument for women's inclusion in peace processes rests on quantitative analysis. Research demonstrates that women's participation leads to more gender provisions incorporated into agreements, higher implementation rates and longer lasting peace.³⁴⁵ Bottom line, peace agreements are statistically proven more likely to succeed when they include participation by women civil society members.³⁴⁶ For example, a comparative analysis of agreements with female signatories compared to those without found that agreements with female signatories scored somewhere between 76-89% better in the implementation of women's rights provisions within peace agreements.³⁴⁷ A study commissioned by UN Women found that the quality, or meaningful participation, of women's inclusion is what leads to an overall greater likelihood of success.³⁴⁸ The study also notes that the involvement of women in peace processes has never weakened a peace process, hence women's meaningful participation can only help to increase the likelihood for the success of agreements.³⁴⁹

Qualitative research also supports women's inclusion, demonstrating how their participation in peace processes helps to shift stalled discussions and facilitates compromise between negotiating parties.³⁵⁰ Women participants are credited with building consensus among negotiating parties, particularly on the need to conclude discussions and implement agreements.³⁵¹ This has been demonstrated in case studies, for example, from Colombia, Northern Ireland, and Nepal, where efforts by women peacemakers to include gender provisions broadened the understanding of conflicts beyond an us-versus-them dynamic.³⁵²

³⁴⁴ *Id.* at 48.

³⁴⁵ See Krause et al., *supra* note 332, at 1005; True & Riveros-Morales, *supra* note 332, at 36 (finding that women's participation in peace processes from 2000-2016 were more likely to include gender-sensitive provisions).

³⁴⁶ PAFFENHOLZ ET AL., *supra* note 336, at 5.

³⁴⁷ Krause et al., *supra* note 332, at 1002.

³⁴⁸ PAFFENHOLZ ET AL., *supra* note 336, at 5.

³⁴⁹ *Id.* at 6.

³⁵⁰ CHRISTINE BELL, TEXT AND CONTEXT: EVALUATING PEACE AGREEMENTS FOR THEIR 'GENDER PERSPECTIVE' 23 (Leigh Pasqual ed., Oct. 2015).

³⁵¹ COOMARASWAMY, *supra* note 332, at 42.

³⁵² BELL, *supra* note 350, at 23. See PAFFENHOLZ ET AL., *supra* note 336, at 24 (discussing women's participation in Nepal and Ireland's peace processes).

Overcoming stereotypes about women peacemakers presents significant challenges. In many cases, it leads to the setting of a higher standard for women's participation compared to that of other groups.³⁵³ They must hold a specific expertise that demonstrates their worthwhile inclusion, while also being prominent leaders of large grassroots constituencies capable of building pressure for representation. While the growing movement for a survivor-centered approach recognizes the necessity of survivor participation and views survivors as rights-holders, historically women's participation has been discussed under the WPS agenda but not traditionally viewed from the lens of survivors as rights-based holders per se.³⁵⁴ This is because the diverse range of harms women experience in conflict go largely unseen. Instead, women are siloed to the "sexual violence" category, which is saddled with preconceived notions that dismisses its gravity.

B. A gender persecution survivor-centered approach to peace and transitional justice processes

Similar to the principle of women's participation in peace processes, one of the United Nations' guiding principles in its approach to transitional justice is the inclusion of the experiences of survivors.³⁵⁵ The argument rests on the premise that participation is a positive experience for survivors, which in turn, supports the sustainability of transitional justice outcomes. Participation opens up space for survivors in the public sphere, a space that has often been denied to them. It also provides them with a measure of recognition, not only as victims, but as rights-holders, which is one of the aims of transitional justice in general.³⁵⁶

The UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, argues in support of survivor participation for two main reasons. First, survivors are in the best position to contribute not only evidence on how atrocities took place, but also the

³⁵³ MARIE O'REILLY ET AL., REIMAGINING PEACEMAKING: WOMEN'S ROLES IN PEACE PROCESSES 4 (Int'l Peace Inst., 2015).

³⁵⁴ See, e.g., S.C. Res. 1325, ¶¶ 1, 10 (Oct. 31, 2000) (calling for women's participation in conflict resolution, peacebuilding, peacekeeping, humanitarian response and post-conflict reconstruction processes, as well as protection measures for women and girls to prevent conflict-related sexual violence).

³⁵⁵ U.N. SECRETARY-GENERAL, GUIDANCE NOTE OF THE SECRETARY GENERAL UNITED NATIONS APPROACH TO TRANSITIONAL JUSTICE 2 (2010), https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf (last visited Aug. 1, 2020); RALPH SPRENKELS, 'RESTRICTED ACCESS': PROMISES AND PITFALLS OF VICTIM PARTICIPATION IN TRANSITIONAL JUSTICE MECHANISMS 7 (2017), https://www.impunitywatch.nl/docs/ResearchReport_Restricted_Access_Promises_Pitfalls_Victim_Participation_2017_eng.pdf (last visited Aug. 1, 2020).

³⁵⁶ Pablo de Grieff (Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence), Rep. to the Hum. Rts Council, ¶ 89, U.N. Doc. A/HRC/34/62 (Dec. 27, 2016).

context in which they happened,³⁵⁷ setting the stage for meaningful prevention of future atrocities. Survivors also have a privileged perspective of the ways in which corruption and discrimination work within the institutions and laws that failed to protect their rights. Second, as rights-holders, survivors bring a level of credibility and sustainability to the acceptance of peace accords and transitional justice mechanisms.³⁵⁸ This, in turn, encourages other survivors to come forward, building society's trust in and acceptance for the proposed remedies along the way.³⁵⁹ It also creates obligations on the part of survivors, which increases their agency as full actors and encourages their ownership over the process.³⁶⁰ Overall, this helps to create more durable peace.

Still, obligations to survivors are highly challenging to fulfill in transitional and national justice mechanisms. Criminal tribunals can take years to conclude, delaying community healing, which often comes with a short window of opportunity. Weak or corrupt criminal justice systems are often not in a credible or capacitated position to take on trials for mass atrocities. At the international level, the ICC has worked to deliver both accountability for perpetrators and a survivor-centered justice. Yet, the Court's narrow focus on high-level perpetrators for the most serious crimes leads to long court cases and faraway trials that are difficult to meaningfully translate back into community-level reconciliation.

One of the UN Security Council Resolutions on Women Peace and Security that follows after the two main UN General Assembly resolutions³⁶¹ discussing survivors' rights within the UN system, is UN Security Council Resolution 2467.³⁶² Notably, Resolution 2467 calls for survivor participation in peace and transitional justice processes, recognizing survivors of both sexual and gender-based violence as rights holders.³⁶³ It demonstrates a sophisticated understanding of how gender-based violence works in its recognition of the discriminatory intent held by perpetrators to commit such violence. The Resolution explains: "acts of sexual and gender-based violence

³⁵⁷ *Id.* ¶ 88.

³⁵⁸ *Id.* ¶ 95.

³⁵⁹ *Id.*

³⁶⁰ DAVID TAYLOR, VICTIM PARTICIPATION IN TRANSITIONAL JUSTICE MECHANISMS: REAL POWER OR EMPTY RITUAL? 24 (2014), https://static.wixstatic.com/ugd/f3f989_053a6f3aa4f845fe9e8bae444bc2d755.pdf (last visited Aug. 1, 2020).

³⁶¹ The other two resolutions most commonly identified with survivors' rights are G.A. Res. 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Nov. 29, 1985) and G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Mar. 21, 2006).

³⁶² S.C. Res. 2467, *supra* note 11.

³⁶³ *Id.* ¶ 16.

in conflict can be part of the strategic objectives and ideology of, and used as a tactic by certain parties to armed conflict.”³⁶⁴ The Resolution specifically comments on how gender discrimination acts as a driver to conflict because of the (1) under-representation of women in decision-making roles; (2) structural inequalities; (3) impacts of discriminatory laws and gender-bias in the enforcement of existing laws; (4) harmful social norms and practices; and (5) discriminatory views on women or gender roles in society.³⁶⁵

This last point is particularly significant. By naming both “women” and “gender roles” as discriminatory categories, Resolution 2467 acknowledges discrimination based on “sex” and “gender” and their inextricable link. In this way, the Resolution reaffirms the OTP Policy Paper, which finds that gender-based crimes are committed against persons because of their sex and/or socially constructed gender roles.³⁶⁶ Fittingly, the Resolution tips its hat to the Rome Statute’s inclusion of sexual and gender-based crimes, naming them as “among the most serious crimes of international concern.”³⁶⁷

Resolution 2467 recognizes that conflict-related sexual violence exists on a continuum of gender-based violence and intertwines with pre-existing discriminatory violence that is exacerbated during conflict.³⁶⁸ Unlike some of its predecessors, the Resolution takes a holistic view of gender-based violence survivors, calling for non-discriminatory practices in preventing and addressing conflict-related sexual violence, especially for “vulnerable” or “targeted” groups³⁶⁹— terms routinely used in UN resolutions when referring to the inclusion of LGBTIQ persons. Resolution 2467 also notes how conflict exacerbates other forms of gender-based violence (other than violence against women and girls), which not only recognizes LGBTIQ persons, but also non-binary and gender non-conforming persons.³⁷⁰

Notably, Resolution 2467 refers back to Resolution 1325, affirming the importance of women’s participation in peace processes by pointing to both practical reasons and state obligations under international law, and condemning women’s consistent under-representation.³⁷¹ In this way, the Council is careful not to confine women to the “protection box,” instead asserting that strengthening women’s empowerment is equally important.³⁷²

³⁶⁴ *Id.* ¶ 28.

³⁶⁵ *Id.* ¶ 12.

³⁶⁶ ICC OTP POLICY PAPER, *supra* note 3, ¶ 16. *See supra* pp. 11-12 discussing the *Bostock* case (also noting the inextricable link between “sex” and “gender” in the intent to discriminate).

³⁶⁷ S.C. Res. 2467, *supra* note 11, ¶ 15.

³⁶⁸ *Id.* ¶ 13.

³⁶⁹ *Id.* ¶ 16.

³⁷⁰ *Id.* at 2.

³⁷¹ *Id.* ¶ 20.

³⁷² *Id.*

Accordingly, it advances the discourse on conflict resolution by calling for the strengthening of gender equality and women's empowerment in addressing the root causes of conflict.³⁷³

The Resolution also calls on states “to ensure the opportunity for the full and meaningful participation of survivors of sexual and gender-based violence at all stages of transitional justice processes.”³⁷⁴ It asks for recommendations on how “the UN can better support local, national, and regional efforts to address the needs of survivors of sexual violence in conflict.”³⁷⁵ Through its analysis, the Council affirms that gender-based violence may encompass sexual violence but also go beyond it. In doing so, it makes the argument for supporting a survivor-centered approach that includes women as well as LGBTIQ, non-binary and gender non-conforming persons, and addressing all conflict-related gender-based crimes.

Applying a survivor-centered approach as called for by Resolution 2467 would do much to improve the outcomes of peace and justice processes. The international community could do this by mandating the inclusion of recognized conflict-related gender persecution survivors' participation in the design and implementation of peace accords and transitional justice mechanisms. Under the survivor-centered methodology, women earn a right to participation—not as the stereotype of women being vulnerable and needing protection—but as a protected class under international law. Recognition of this class of victims would also open doors to LGBTIQ, non-binary and gender non-conforming persons gaining a seat at peace and transitional justice tables, including those who face intersecting forms of discrimination.

Survivors' inclusion is critical to sustainable peace and holistic accountability. Survivors with strong community ties can contribute significant experience from local peacemaking activities during conflict, which can build credibility and local buy-in to peace processes. Their participation is critical to understanding the larger contextual analysis of why crimes happen, informing the solutions for how to prevent future conflict.³⁷⁶ Understanding the broader scope of crimes committed on the basis of gender

³⁷³ *Id.*

³⁷⁴ *Id.* ¶ 16d.

³⁷⁵ *Id.* ¶ 5.

³⁷⁶ See U.N. SECRETARY-GENERAL, WOMEN, PEACE AND SECURITY 2002, ¶ 164, U.N. Sales No. E.03.IV.1 (2002) (finding the participation of women in peace processes is “crucial in the establishment of sustainable peace” and that “[w]omen cannot voice their concerns if they are not consulted by fact-finding missions or if they are not involved in peace negotiations”). For an interesting discussion and research findings on the role and impact of all actors and groups included in official peace negotiations, see THANIA PAFFENHOLZ, BEYOND THE NORMATIVE: CAN WOMEN'S INCLUSION REALLY MAKE FOR BETTER PEACE PROCESSES? (The Graduate Institute Geneva, 2015).

leads to increased participation by a more diverse set of survivors, while also reaffirming the historical need for women's participation. When there are no means for creating peace or transitional justice processes or where domestic trials have failed to take gender-based crimes into account, the international community should support local community initiatives that take a survivor-centered approach.

CONCLUSION

Whatever form accountability may take, whether a traditional tribunal or a restorative justice approach, there must first be agreement on what constitutes a crime. Without recognizing gender-based persecution committed against women, girls, LGBTIQ, non-binary and gender non-conforming persons, peace and transitional justice processes may unwittingly reinforce discriminatory gender narratives in laws, policies and culture and further ensconce the gender-based violence used to uphold them. The recognition of gender persecution as a crime not only shepherds in survivor participation, it also offers a way for the international and local communities to stand in solidarity with victims and their families who deserve justice. It would make clear to perpetrators: these are crimes of international concern and impunity will not be tolerated. Ultimately, it would help lay a sustainable foundation for more stable and just peace.

Peace and transitional justice processes not only work to right wrongs on an accountability level, they also play a profound role as historians to mass atrocities. When gender-based crimes are overlooked, this omission works to reinforce the oppressive gender narratives imposed on women, girls, LGBTIQ, non-binary, and gender non-conforming persons. In essence, history defines who has rights by defining who is and is not included. In the absence of accountability for gender persecution, justice may recognize torture, murder, enslavement and sexual violence as egregious crimes, but if there is no recognition of the gendered motivations behind them, then only half the story is told. Without capturing *why* these crimes are committed, namely, to oppress and punish women, girls, LGBTIQ, non-binary and gender non-conforming persons who deviate from their prescribed gender narratives, justice is ignored, acting as a silent endorser of the persistent use of gender-based violence as a means to enforce oppression.

There are many steps the international and local communities could take to hold perpetrators of gender-based persecution accountable and provide support to survivors of these crimes, including the following:

- a) Encourage the UN Secretary General to commission an in-depth study on the various forms of gender-based violence that take place during conflicts and atrocities. These should include acts that fall

beyond the scope of sexual violence and intersect with other forms of discrimination. The study should also note how and when these crimes may amount to persecution and provide viable recommendations to UN agencies on accountability and redress;

- b) Encourage the UN Security Council to mandate the inclusion of gender persecution in investigations and accountability mechanisms where crimes against humanity may have taken place;
- c) Implement UN Security Council Resolution 2467 and ensure that survivors of gender-based crimes have an opportunity to fully and meaningfully participate in peace and transitional justice mechanisms and in their design;
- d) Support and inform traditional and restorative justice mechanisms on the inclusion of the gender persecution framework, including for survivors who face multiple and intersecting forms of discrimination;
- e) Create a handbook and provide training for first responders, documenters, investigators, prosecutors, and other justice actors on how to identify, investigate, and hold perpetrators of gender-based persecution crimes accountable. The handbook should also include recommendations on how to assist survivors of such crimes;
- f) Build the capacity of first responders to recognize a broader swathe of gender-based violence and provide tailored, appropriate responses to survivors;
- g) Support community-based organizations that provide immediate and long-term services to survivors of gender-based violence.

This is the time to dust off the law books on gender persecution and start holding perpetrators of gender-based crimes in conflict and atrocities accountable. The international community should refocus the gender discrimination lens to reach crimes beyond sexual violence, broadening the recognition of survivors affected by those crimes, deepening the understanding of how multiple forms of discrimination impact survivors and acknowledging that gender-based violence works on a continuum of oppression that pre-dates conflict.

